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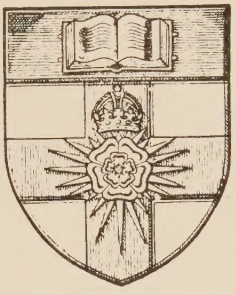

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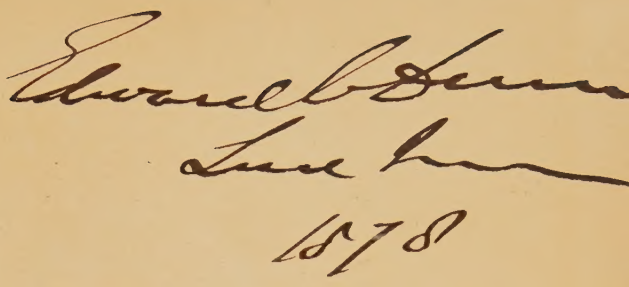

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Adnam *v.* Earl of Sandwich		485
Aitchison, Lohre *v.*		501
Aldrich, Diss Urban Sanitary Authority *v.*		179
Aspinall, Reg. *v.*	(C. A.)	48
Atherley *v.* Harvey		524

B.

Baker *v.* Oakes	(C. A.)	171
Barrow Steel Company, Duke of Devonshire *v.*	(C. A.)	286
Bedwell *v.* Wood		626
Booth *v.* Briscoe	(C. A.)	496
Bowes, Shand *v.*	(C. A.)	112
Boyle, Stubbs *v.*		124
Bradlaugh, Reg. *v.*		569
Briscoe, Booth *v.*	(C. A.)	496
Britannia Ironworks Company, Metcalfe *v.*	(C. A.)	423
Brown *v.* Great Eastern Railpany		406
Buenos Ayres and Ensenada Port Railway Company *v.* Northern Railway Company of Buenos Ayres		210
Burrows, Fraser *v.*		624

C.

Cameron, Bank of Montreal *v.*	(C. A.)	536
Clifton Union, Guardians of, *v.* Overseers of Liverpool		540
Cohn *v.* Davidson		455
Cole *v.* Manning		611
Collins, Reg. *v.*	(C. A.)	30
Cooper, Reg. *v.*	(C. C. R.)	510
Cowie, Peters *v.*		131
Cross, Leadbeater *v.*		18
Cumberlege, Reg. *v.*		366
Cundy, Lindsay *v.*	(C. A.)	96

D.

Dale, Serjeant *v.*		558
Dargan *v.* Davies		118
Davidson, Cohn *v.*		455
Davies, Dargan *v.*		118
Dawes, Sharp *v.*	(C. A.)	26
Deane, Reg. *v.*	(C. C. R.)	305
Defries, Metropolitan Railway Company *v.*		189
———	(C. A.)	387
Devonshire, Duke of, *v.* Barrow Steel Company	(C. A.)	286
Diss Urban Sanitary Authority. *v.* Aldrich		179

E.

PAGE

Evershed *v.* London and North Western Railway Company 254

F.

Finch *v.* Guardians of York Union 15
Flattery, Reg. *v.* (C. C. R.) 410
Fletcher, Reg. *v.* (C. A.) 43
Fraser *v.* Burrows 624
Freeman, Scutt *v.* 177
Foster, Reg. *v.* (C. C. R.) 301

G.

Gale, Reg. *v.* (C. C. R.) 141
Gilbey, Glegg *v.* 6
———, ——— *v.* (C. A.) 209
Glandford Brigg, Newark Union *v.* 522
Glegg *v.* Gilbey 6
——— *v.* ——— (C. A.) 209
Goldsworthy, Re 75
Gover, Street *v.* 498
Great Eastern Railway Company, Brown *v.* 406
Great Northern and London & North Western Committee *v.* Inett 284
Great Northern Railway Company, Hopkins *v.* (C. A.) 224
———————, Reg. *v.* 151
Great Western Railway Company, Hooper *v.* 339
———————, Turner *v.* 125
Grece *v.* Hunt 389

H.

Hall, Spurr *v.* 615
Harvey, Atherley *v.* 524
Heap *v.* Marris 630
Henderson, Oastler *v.* (C. A.) 575
Hertford College, Reg. *v.* 590
Hirschfield *v.* London, Brighton, and South Coast Railway 1
Hobbs, Ward *v.* 331

PAGE

Holborn Union, Guardians of, *v.* Vestry of St. Leonard, Shoreditch 145
Hooper *v.* Great Western Railway Company 339
——— *v.* Kenshole 127
Hopkins *v.* Great Northern Railway Company (C. A.) 224
Howling, Tully *v.* (C. A.) 182
Hudson *v.* Tabor (C. A.) 290
Hunt *v.* City of London Real Property Company 605
———, Grece *v.* 389

I.

Inett, Great Northern and London & North Western Committee *v.* 284
Ingall, Reg. *v.* 199
Ipswich Union, Reg. *v.* 269

J.

Jones *v.* Victoria Graving Dock Company (C. A.) 314

K.

Karet *v.* Kosher Meat Association 361
Kenny, Reg. *v.* (C. C. R.) 307
Kenshole, Hooper *v.* 127
Keyn, Reg. *v.* (C. C. R.) 90
Knight, Webb *v.* 530

L.

Langton, Reg. *v.* (C. C. R.) 296
Lascelles *v.* Lord Onslow 433
Leadbeater *v.* Cross 18
Leask *v.* Scott (C. A.) 376
Lester *v.* Torrens 403
Lindsay *v.* Cundy (C. A.) 96
Liverpool, Overseers of, Guardians of Clifton Union *v.* 540
Lohre *v.* Aitchison 501
London, Brighton, and South Coast Railway, Hirschfield *v.* 1

PAGE

London, City of, Real Property Company, Hunt *v.* 605
London & North Western Railway Company, Eversheed *v.* 254
London Omnibus Company, Wright *v.* 271

M.

Manning, Cole *v.* 611
Mansel, Webb *v.* (C. A.) 117
Marris, Heap *v.* 630
Metcalfe *v.* Britannia Ironworks Company (C. A.) 423
Metropolitan Bank, Rumball *v.* 194
Metropolitan Board of Works *v.* New River Company (C. A.) 67
Metropolitan Railway Company *v.* Defries 189
——————— (C. A.) 387
Middlesex, Justices of, Reg. *v.* 516
Monck, Reg. *v.* (C. A.) 544
Montreal, Bank of, *v.* Cameron (C. A.) 536
Murphy, Re 397

N.

Newark Union *v.* Glanford Brigg 522
New River Company, Metropolitan Board of Works, *v.* (C. A.) 67
Newson, Randall *v.* (C. A.) 102
North Eastern Railway Company, Robson, *v.* (C. A.) 85
Northern Railway Company of Buenos Ayres, Buenos Ayres and Ensenada Port Railway Company 210

O.

Oakes, Baker *v.* (C. A.) 171
Oastler *v.* Henderson (C. A.) 575
Onslow, Lord, Lascelles *v.* 433
Ovenden, Tassell *v.* 383

P.

PAGE

Pacific Steam Navigation Company, Sanguinetti *v.* (C. A.) 238
Pepper, Whiteley *v.* 276
Peters *v.* Cowie 131
Price, Robinson *v.* 91
——, ——— *v.* (C. A.) 295

Q.

Queen, The, Rustomjee, *v.* (C. A.) 69

R.

Randall *v.* Newson (C. A.) 102
Reg. *v.* Aspinall (C. A.) 48
—— *v.* Bradlaugh 569
—— *v.* Collins (C. A.) 30
—— *v.* Cooper (C. C. R.) 510
—— *v.* Cumberlege 366
—— *v.* Deane (C. C. R.) 305
—— *v.* Flattery (C. C. R.) 410
—— *v.* Fletcher (C. A.) 43
—— *v.* Foster (C. C. R.) 301
—— *v.* Gale (C. C. R.) 141
—— *v.* Great Northern Railway Company 151
—— *v.* Hertford College 590
—— *v.* Ingall 199
—— *v.* Ipswich Union 269
—— *v.* Justices of Middlesex 516
—— *v.* Kenny (C. C. R.) 307
—— *v.* Keyn (C. C. R.) 90
—— *v.* Langton (C. C. R.) 296
—— *v.* Monck (C. A.) 544
—— *v.* Richards (C. C. R.) 311
—— *v.* Rymer (C. C. R.) 136
—— *v.* Scott (C. C. R.) 415
—— *v.* Steel (C. A.) 37
—— *v.* St. Pancras Assessment Committee 581
—— *v.* Tatlock (C. C. R.) 157
—— *v.* Tucker (C. C. R.) 417
—— *v.* Wingland 349
Richards, Reg. *v.* (C. C. R.) 311
Robinson *v.* Price 91
——— *v.* —— (C. A.) 295
Robson *v.* North Eastern Railway Company (C. A.) 85

PAGE

Rumball *v.* Metropolitan Bank 194
Rustomjee *v.* The Queen (C. A. 69
Rymer, Reg. *v.* (C. C. R.) 136

S.

Samson, Turner *v.* (C. A.) 23
Sandwich, Earl of, Adnam *v.* 485
Sanguinetti *v.* Pacific Steam Navigation Company (C. A.) 238
Scott, Leask *v.* (C. A.) 376
——, Reg. *v.* (C. C. R.) 415
Scutt *v.* Freeman 177
Serjeant *v.* Dale 558
Shand *v.* Bowes (C. A.) 112
Sharp *v.* Dawes (C. A.) 26
Shaw, A. R., Ex parte (C. A.) 463
Sheffield Nickel Company *v.* Unwin 214
Silber, Sugg *v.* (C. A.) 493
Smith, Venables *v.* 279
Southampton Gas Company *v.* Southampton Guardians 371
Southampton Guardians, Southampton Gas Company *v.* 371
Spurr *v.* Hall 615
Steel, Reg. *v.* (C. A.) 37
St. Leonard, Shoreditch, Vestry of, Guardians of Holborn Union *v.* 145
St. Pancras Assessment Committee, Reg. *v.* 581
Street *v.* Gover 498
Stubbs *v.* Boyle 124
Sugg *v.* Silber (C. A.) 493

T.

Tabor, Hudson *v.* (C. A.) 290
Tassell *v.* Ovenden 383

PAGE

Tatlock, Reg. *v.* (C. C. R.) 157
Torrens, Lester *v.* 403
Tucker, Reg. *v.* (C. C. R.) 417
Tully *v.* Howling (C. A.) 182
Turner *v.* Great Western Railway Company 125
——— *v.* Samson (C. A.) 23

U.

Unwin, Sheffield Nickel Company *v.* 214

V.

Venables *v.* Smith 279
Verdin *v.* Wray 608
Victoria Graving Dock Company, Jones *v.* (C. A.) 314

W.

Ward *v.* Hobbs 331
Webb *v.* Knight 530
——— *v.* Mansel (C. A.) 117
Whiteley *v.* Pepper 276
Wimshurst *v.* Barrow Shipbuilding Company 335
Wingland, Reg. *v.* 349
Wood, Bedwell *v.* 626
Woolfe *v.* Horne 355
Wray, Verdin *v.* 608
Wright *v.* London Omnibus Company 271

Y.

York Union, Guardians of, Finch *v.* 15

TABLE OF CASES CITED.

A.

		PAGE
Adams *v.* Lancashire Railway Company.	Law Rep. 4 C. P. 739	86
Alexander *v.* Vanderzee	Law Rep. 7 C. P. 530	113, 114, 115, 116
Alliance Bank *v.* Broom	2 Dr. & Sm. 289	378, 382
Anderson *v.* Bank of British Columbia	2 Ch. D. at p. 644	527
Annen *v.* Woodman	3 Taunt. 299	461
Arlett *v.* Ellis	7 B. & C. 346	445, 466
Arnold *v.* City Bank	1 C. P. D. 578	195
Atkinson *v.* Fosbroke	Law Rep. 1 Q. B. 628	526
——— *v.* Newcastle and Gateshead Waterworks Company	Law Rep. 6 Ex. 404	149
Attorney General *v.* Great Northern Railway Company	1 Dr. & Sm. 154, at p. 163	263
——— *v.* Richards	2 Anstr. 603	268

B.

Baker *v.* Lane	3 H. & C. 544	526
——— *v.* Oakes	2 Q. B. D. 171	336
Bankers' Case	14 How. St. Tr. 1	70
Bannister *v.* Breslauer	Law Rep. 2 C. P. 497	242, 243
Barber *v.* Meyerstein	Law Rep. 4 H. L. 317	195
Barker *v.* MacAndrew	18 C. B. (N.S.) 159	460
——— *v.* Midland Railway Company	18 C. B. 46	262
Baron de Bode *v.* Reg.	8 Q. B. pp. 270–4; 8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 449	70, 71
Bartlett *v.* Lewis	12 C. B. (N.S.) 249	528
Bateman *v.* Phillips	15 East, 272	320
Bates *v.* Winstanley	4 M. & S. 429	546
Battishill *v.* Reed	18 C. B. 696	620, 623
Baumann *v.* James	Law Rep. 3 Ch. 508	321
Beattie *v.* Lord Ebury	Law Rep. 7 Ch. at p. 802	4
Beckett *v.* Bilbrough	8 Hare, 188	195
Bedford *v.* Bagshaw	4 H. & N. 538	332
Behn *v.* Burness	3 B. & S. 751	185, 215
Bell *v.* Postlethwaite	5 E. & B. 695	336, 338
Bellis *v.* Beal	2 Esp. 592	420
Belshaw *v.* Bush	11 C. B. 191	487

		PAGE
Betts *v.* Great Eastern Railway Company	Law Rep. 8 Ex. 294	339, 348
—— *v.* Thompson	6 Ch. D. 732	445
Bickerdike *v.* Bollman	1 T. R. 405; 2 Sm. L. C. 7th ed. 50	24, 25
Bickford *v.* Darcy	Law Rep. 1 Ex. 354	526
Birkley *v.* Presgrave	1 East, 220	94
Birkmyr *v.* Darnell	1 Sm. L. C. 310, at p. 318, 7th ed.	320
Bishop *v.* Hayward	4 T. R. 470, 472	55
Blacquiere *v.* Hawkins	1 Dougl. 378	563, 565
Blankley *v.* Winstanley	3 T. R. 279	546
Bluett *v.* Osborne	1 Stark. 384	104
Bonar *v.* Macdonald	3 H. L. C. 226	215
Bowley *v.* Chelsea Waterworks Company	17 Q. B. 358	585
Bowman *v.* Blyth	7 E. & B. 26	206
Boyce *v.* Higgins	14 C. B. 1	609, 610
Bradford *v.* Williams	Law Rep. 7 Ex. 259	186
Brand *v.* Hammersmith Railway Company	Law Rep. 4 H. L. 171	228, 237, 238
Bridges *v.* North London Railway Company	Law Rep. 7 H. L. 213	86, 87, 89
Brigden *v.* Heighes	1 Q. B. D. 330	385, 386
British Sugar Refining Company, Re	3 K. & J. 408	468, 471, 478
Brookes *v.* Earl Rivers	Hard. 503	564
Brown *v.* Brown	35 L. T. 54	215
——— *v.* Edgington	2 M. & G. 279	107
——— *v.* Shaw	1 Ex. D. 425	285
Brownlow *v.* Metropolitan Board of Works	13 C. B. (N.S.) 768	148
Bruce *v.* Nicolopulo	11 Ex. 129	460
Bullen & Sheene's Case	Godb. No. 437, p. 343	445, 448
Burges *v.* Clements	4 M. & S. 306	140
Burgess *v.* Wheate	1 Eden. Ch. 177	70
Burrell, Ex parte	1 Ch. D. 557	11
Burns *v.* Poulsom	Law Rep. 8 C. P. 563	281

C.

Calyes' Case	8 Co. Rep. 32; 1 Sm L. C. 7th ed. 122	140
Camden, Lord, *v.* Home	4 T. R. 382	563, 565
Carrington, Lord, *v.* Wycombe	Law Rep. 3 Ch. 377	339
Carter *v.* Flower	16 M. & W. 743, 748	24, 25
Caton *v.* Caton	Law Rep. H. L. 127	321
Cattley *v.* Vincent	15 Beav. 198	21
Chandelor *v.* Lopus	1 Sm. L. C. 7th ed. 173	332
Chartered Bank of India, &c. *v.* Henderson	Law Rep. 5 P. C. 501	377
Chester, Company of Ironmongers of, *v.* Bowker	1 Str. 639	564
Chesterfield *v.* Janssen	1 W. & T. (L. C. in Eq.) 541	632
Chickham *v.* Dickson	12 Mod. 132	562, 564
Chilton *v.* London and Croydon Railway Company	16 M. & W. 212	408, 409
Chinnery *v.* Evans	11 H. L. C 115	486
Christopherson *v.* Lotinga	15 C. B. (N.S.) 809	537
Churchman *v.* Tunstal	Hardr. 162	228
Churchward *v.* Reg.	Law Rep. 1 Q. B. 173	70
Clark *v.* Dickson	E. B. & E. 148	215

		PAGE
Clough *v.* London and North Western Railway Company	Law Rep. 7 Ex. 26	98
Cockle *v.* London and South Eastern Railway Company	Law Rep. 7 C. P. 321	87
Coe *v.* Wise	Law Rep. 1 Q. B. 711	148
Commissioners of Sewers *v.* Glasse	Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134	445, 446
Commonwealth, The *v.* Holmes	17 Mass. Rep. 335, at p. 336	571
——— *v.* Sharpless	2 Serg. & Rawl. 91, at p. 103	571
Const *v.* Harris	T. & R. 518	215
Coope *v.* Cresswell	Law Rep. 2 Ch. 112	487
——— *v.* Marshall	1 Bur. 259, at p. 265	447
Cork Distillers Company *v.* Great Southern and Western Railway Company	Law Rep. 7 H. L. 269	424
Cory *v.* Bristow	2 App. Cas. 262, at p. 275; Law Rep. 10 C. P. 504; 1 C. P. D. 54	585, 586, 587
—— *v.* Churchwardens of Greenwich	Law Rep. 7 C. P. 499	585
—— *v.* Yarmouth and Norwich Railway Company	3 Hare, 593	228
Couch *v.* Steel	3 E. & B. 402	148, 333
Cowell *v.* Amman Colliery Company	6 B. & S. 333	628
Cowan, Ex parte	3 B. & Ald. 123, 345	563, 565
Crouch *v.* Credit Foncier	Law Rep. 8 Q. B. 374	195
Crow *v.* Falk	8 Q. B. 467	457
Currie *v.* Misa	Law Rep. 10 Ex. 153, at p. 168	378

D.

Da Costa *v.* Newnham	2 T. R. 407	508
Dakin *v.* Cope	2 Russ. 170, on appeal p. 181	191
Daly *v.* Thompson	10 M. & W. 309	195
Daniel *v.* Bond	9 C. B. (N.S.) 716	625
Dearden *v.* Townsend	Law Rep. 1 Q. B. 10	408
De Beauvoir *v.* Owen	5 Ex. 166; 16 M. & W. 547	486
Dimech *v.* Corlett	12 Moo. P. C. 199	185
Dimes *v.* Grand Junction Canal Company	3 H. L. C. 794	564
Doe *v.* Shipphard	1 Doug. 75	21
Dr. Sacheverell's Case	15 How. St. Tr. at p. 466	570, 571
Dublin, Archbishop of, *v.* Lord Trimleston	12 Ir. Eq. 251	487
Durrell *v.* Evans	1 H. & C. 174	320

E.

East Looe *v.* Cornwall	3 B. & S. 20	546
Eddleston *v.* Francis	7 C. B. (N.S.) 568	396
Edmunds *v.* Bishop of Exeter	5 Bing. N. C. 652	562
——— *v.* Greenwood	Law Rep. 4 C. P. 70	526
Edwards *v.* Brown	1 C. & J. 307	5
Egerton *v.* Massey	3 C. B. (N.S.) 338	21
Ely, Isle of	10 Co. Rep. 143 a.	294
Emmerton *v.* Matthews	7 H. & M. 586	333, 334
Epping Forest Case	Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134	453
Esdaile *v.* Sowerby	11 East, at p. 117	25
Eustace *v.* Dublin Trunk Connecting Railway Company	Law Rep. 6 Eq. 182	195
Evans *v.* Evans	3 Ad. & E. 132	357, 358

F.

		PAGE
Fearson *v.* Mitchell	Law Rep. 7 Q. B. 690	130
Fenton *v.* City of Dublin Steam Packet Company	8 A. & E. 835	281
Fenwick *v.* Robinson	3 C. & P. 323, at p. 324	508
Fetter *v.* Beale	1 Salk. 11	620
Filewood *v.* Palmer	Mosely, 169	447
Fisher *v.* Dewick	4 Bing. (N.C.) 706	494
——— *v.* Fenwick	4 Bing. N. C. 706	494
——— *v.* Marsh	6 B. & S. 411	358
——— *v.* Samuda	1 Camp. 190	106
Forrest *v.* Overseers of Greenwich	8 E. & B. 890, at p. 900	585
Forsdike *v.* Stone	Law Rep. 3 C. P. 607.	628
Foster *v.* Mackinnon	Law Rep. 4 C. P. 704.	3
———, Re	4 B. & S. 187	564
Fowler *v.* Hollins	Law Rep. 7 Q. B. 616	98
——— *v.* Lock	Law Rep. 7 C. P. 272; 9 C. P. 751	281, 282
Frailing *v.* Messenger	16 L. T. (N.S.) 332	420
Francesco *v.* Massey	Law Rep. 8 Ex. 101	243, 244
Francis *v.* Cockrell	Law Rep. 5 Q. B. 501, 503	104, 110, 112, 457
Franklyn *v.* Lamand	4 C. B. 637	357
Frederici *v.* Vanderzee	2 C. P. D. 70	536, 537, 539
Freeman *v.* Read	9 C. B. (N.S.) 301	372
French *v.* Gerber	1 C. P. D. 737, since affirmed by the Court of Appeal, Feb. 6, 1877, 2 C. P. D.	244, 252
Full *v.* Hutchins	2 Cowp. 422	563, 564
Furness *v.* Booth	4 Ch. D. 586	499
Fynn, Re	12 Jur. 713	81

G.

Gardiner *v.* Gray	4 Camp. 144	106, 108
Garrett *v.* Messenger	16 L. T. (N.S.) 414	420
Garton *v.* Bristol and Exeter Railway Company	6 C. B. (N.S.) 639	263
——— *v.* Great Western Railway Company	5 C. B. (N.S.) 669	263
Gaskell *v.* Gaskell	2 Y. & J. 502	71
Gee *v.* Metropolitan Railway Company	Law Rep. 8 Q. B. 161.	86, 87
Geeve *v.* Gorton	3 Dowl. & L. 481	627
Gibson *v.* Small	4 H. L. C. 353	457
Gill's Cases	2 B. & Ald. 204	55
Glasgow, City of, Union Railway Company *v.* Caledonian Railway Company	Law Rep. 2 H. L., Sc. 160	339, 343
Glynn *v.* Houston	1 Keen, 329	525
Goff *v.* Biby	Cro. Eliz. 540	312
Golding *v.* Wharton Saltworks Company	1 Q. B. D. 374	633
Goodwin *v.* Robarts	Law Rep. 10 Ex. 337.	194
Gorris *v.* Scott	Law Rep. 9 Ex. 125	148, 333
Gould *v.* Gapper	5 East, 345	563
Gourley *v.* Plimsoll	Law Rep. 8 C. P. 362.	527
Gray *v.* Carr	Law Rep. 6 Q. B. 522.	245
—— *v.* Cox	4 B. & C. 108, 115	106, 107
—— *v.* Golding	6 Jur. (N.S.) 474	21

		PAGE
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27, 40	346
Great Western Railway Company *v.* May	Law Rep. 7 H. L. 283	339, 340, 341, 347, 349
——— *v.* Smith	2 Ch. D. 235	339
——— *v.* Sutton	Law Rep. 4 H. L. 226	268
Greenfield *v.* Reary	Law Rep. 10 Q. B. 217	527
Gregory *v.* Tavernor	6 C. & P. 280	420
——— *v.* Tuffs	6 C. & P. 271	420
Gumm *v.* Fowler	2 E. & E. 890	330, 331, 325, 327, 328, 329
Gurney *v.* Behrend	3 E. & B. 622	195

H.

Hall *v.* Byron	4 Ch. D. 667.	447
——— *v.* Green	9 Ex. 247	418, 420
Hanson *v.* Roberdeau	Peake, N. P. C. 163	357
Hardingham *v.* Allen	5 C. B. 793	358
Hardman *v.* Booth	1 H. & C. 803	96, 97, 98, 100
Harland *v.* Mayor, &c., of Newcastle	Law Rep. 5 Q. B. 47	628
Harris *v.* Cockermouth and Workington Railway Company	3 C. B. (N.S.) 693	262, 267
Harrison *v.* Bank of Australasia	Law Rep. 7 Ex. 39	94, 296
Havelock *v.* Geddes	10 East, 555	185, 188
Head's Case	Law Rep. 3 Eq. 84	466
Heath *v.* Unwin	10 M. & W. 684	494
Henly *v.* Mayor of Lyme	5 Bing. at p. 109	293
Heyman *v.* Reg.	Law Rep. 8 Q. B. 102, 105	55, 57, 67
Hill *v.* Balls	2 H. & N. 299	333
Hilton *v.* Lord Granville	5 Q. B. 701	447
Hochster *v.* De La Tour	2 E. & B. 678	428
Hodges *v.* Bennett	5 H. & N. 625	613
Hollis *v.* Marshall	2 H. & N. 755	609, 610
Holmes *v.* Wilson	10 A. & E. 503	620
Holroyd *v.* Marshall	10 H. L. C. 191	378
Horwood *v.* Smith	2 T. R. 750	98
Hubert *v.* Treherne	3 M. & G. 743	321
——— *v.* Turner	4 Scott, N. R. 486	321
Hughes *v.* Stubbs	1 Hare, 476	71
Hunt *v.* Hibbs	5 H. & N. 123	206
Hurst *v.* Osborne	18 C. B. 144	457
Hutton *v.* Scarborough Cliff Hotel Company	2 Dr. & Sm. 514	215
Huzzey *v.* Field	2 C. M. & R. 432	228, 231

I.

Inman *v.* Jenkins	Law Rep. 5 C. P. 738.	527

J.

Jackson *v.* Union Marine Insurance Company	Law Rep. 8 C. P. 572	185
Jacomb *v.* Dodgson	3 B. & S. 461	396
James *v.* Green.	6 T. R. 228	546

		PAGE
Johnson *v.* Chapman	19 C. B. (N.S.) 563	94
Jones *v.* Bright	5 Bing. 533, 540	107
—— *v.* Just	Law Rep. 3 Q. B. 197	109

K.

Keighley's Case	10 Co. Rep. 139 a	292
Kidston *v.* Empire Insurance Company	Law Rep. 1 C. P. 535; 2 C. P. 357	505
Kildare *v.* Eustace	1 Vern. at p. 439	70
King *v.* Reg.	7 Q. B. 782, 795	54, 62
Kingsford *v.* Great Western Railway Company	16 C. B. (N.S.) 761	537, 538, 539
Kintrea, Ex parte	Law Rep. 5 Ch. at p. 101	475
Kish *v.* Cory	Law Rep. 10 Q. B. 553, at p. 560	242, 243, 244
Knight *v.* Faith	15 Q. B. 649	505
Kopitoff *v.* Wilson	1 Q. B. 377, at p. 380	459, 460

L.

Labolmondiere *v.* Addison	1 E. & E. 41	396
Ladbroke *v.* Crickett	2 T. R. 649	563, 565
Laing *v.* Fidgeon	6 Taunt. 108	106
Lake *v.* Plaxton	10 Ex. 196	446
Lancashire and Yorkshire Railway Company *v.* Gidlow	Law Rep. 7 H. L. 517	262
Laugher *v.* Pointer	5 B. & C. 547	281
Lawrence *v.* Ingmire	20 L. T. (N.S.) 391	613
Lee *v.* Lancashire and Yorkshire Railway Company	Law Rep. 6 Ch. 527	273
Le Feuvre *v.* Miller	8 E. & B. 231	205
Leggo *v.* Young	16 C. B. 626	336, 338
Leggott *v.* Metropolitan Railway Company	Law Rep. 5 Ch. 716	388
Lempriere *v.* Pasley	2 T. R. 485	378
Leroux *v.* Brown	12 C. B. 801	323
Letton *v.* Goodden	Law Rep. 2 Eq. 123	228
Lewis *v.* Jones	4 B. & C. 506	3, 4, 5
Lickbarrow *v.* Mason	2 T. R. 63; 6 East, 21, n.	379, 381
Lidgett *v.* Secretan	Law Rep. 6 C. P. 616, 627	505
Lloyd *v.* Lewis	2 Ex. D. 7	178
Lockhart *v.* Falk	10 Ex. 132	243
London, Mayor of, *v.* Cox	Law Rep. 2 H. L. 239, at p. 282	562, 563, 564, 568
London and North Western Railway Company *v.* Bartlett	Law Rep. 7 H. L. 400	424
Luke *v.* Lyde	2 Burr. 882	427, 431
Lyon *v.* Reed	13 M. & W. 285	580
—— *v.* Wells	5 East, 428	457

M.

Maddison *v.* Chapman	4 K. & J. 709	21
Mainprice *v.* Westley	6 B. & S. 420	357
Mangles *v.* Dixon	3 H. L. C. 702	381

		PAGE
Manson *v.* Hope	2 B. & S. 498	129
Marie Joseph, The	Law Rep. 1 P. C. 219	378
Marino's Case	Law Rep. 5 Ch. 596	467
Marriot, Re	1 C. B. (N.S.) 499	262
Marsden *v.* Wardle	3 E. & B. 695	563, 565
McAndrew *v.* Chapple	Law Rep. 1 C. P. 643	183
McCarthy *v.* Metropolitan Board of Works	Law Rep. 7 H. L. 245	228
McHole *v.* Davies	1 Q. B. D. 59	130
McKinnon *v.* Penson	9 Ex. 609	148
Melhado *v.* Hamilton	29 L. T. 364	215
Mellish, Ex parte	8 L. J. (N.S.) 47	367
Mellor *v.* Spateman	1 William's Notes to Saund. Note 4, p. 627	447
Mercer *v.* Davis	10 B. & C. 617	546
Mersey Docks Trustees *v.* Gibbs	Law Rep. 1 H. L. 93	149
Meyerstein *v.* Barber	Law Rep. 2 C. P. 674	378
Midland Great Western Railway Company *v.* Gordon	16 M. & W. 804	195
Mitchell *v.* Crassweller	13 C. B. 237	281
May *v.* Great Western Railway Company	Law Rep. 7 Q. B. 364, 382; Law Rep. 2 H. L. 27, 40	343, 346
Mody *v.* Gregson	Law Rep. 4 Ex. 49	104
Morewood *v.* South Yorkshire Railway Company	3 H. & N. 798	363
Morgan *v.* Edwards	5 H. & N. 415	284
Morgan's Case	1 Mac. & G. 430	215
Morland *v.* Cook	Law Rep. 6 Eq. 267	291
Morley *v.* Dunscombe	11 L. T. 199	281
Moore *v.* Watson	Law Rep. 2 C. P. 314	627, 628
Mostyn *v.* Fabrigas	1 Sm. L. C. 5th ed. 67	210
Musgrave and Hart's Case	Law Rep. 5 Eq. at pp. 203, 204	466, 477, 667

N.

Newton *v.* Cubitt	12 C. B. (N.S.) 32	228, 231, 232, 233, 234, 235
Nichol *v.* Godts	10 Ex. 191	108
Nicholson *v.* Great Western Railway Company	5 C. B. (N.S.) 366	264, 267
Nickalls *v.* Warren	6 Q. B. 615	295
Nickells *v.* Atherstone	10 Q. B. 944	580
Nickley *v.* Heaps	21 L. T. (N.S.) 754	97
North of England Insurance Company *v.* Armstrong	Law Rep. 5 Q. B. 244	505

O.

Osborn *v.* London Dock Company	10 Ex. 698	526

P.

Parkinson *v.* Lee	2 East, 314	106
Parsons *v.* St. Matthew, Bethnal Green	Law Rep. 3 C. P. 56	148, 150
Pashler *v.* Stevenitt	35 L. T. (N.S.) 862	533, 534, 535
Pawlett *v.* Attorney-General	Hard. 465	70

		PAGE
Payne *v.* Partridge	1 Salk. 12	228, 231
Peacock *v.* The Queen	4 C. & B. (N.S.) 264	285
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 473, at p. 568	321
Peele *v.* Merchants' Insurance Company	3 Mason, 27	505
Peirce *v.* Corf	Law Rep. 9 Q. B. 210	321
Pendlebury *v.* Greenhalgh	1 Q. B. D. 36	148
Penn *v.* Baltimore	1 Ves. Sen. at p. 453; 2 Tu. L. C. at p. 936	70
Perry *v.* Fitzhowe	8 Q. B. 757	447
Peters *v.* Sheehan	10 M. & W. 213	285
Phene *v.* Popplewell	12 C. B. (N.S.) 334	577, 578, 580
Pickard *v.* Sears	6 A. & E. 469	198
—— *v.* Smith	10 C. B. (N.S.) 470	277, 278, 279
Pimlico Tramway Company *v.* Greenwich	Law Rep. 9 Q. B. 9	585
Pindar *v.* Wadsworth	2 East, 154	448
Plummer *v.* Wildman	3 M. & S. 48	94
Poingdestre *v.* Royal Exchange Assurance Company	R. & M. 378	508
Pool *v.* Gardner	12 Mod. 132	562, 564
Pope *v.* Whalley	6 B. & S. 303	130
Potter *v.* Home and Colonial Insurance Company	Not reported	620, 622
Powles *v.* Hider	6 E. & B. 207	281, 282, 283
Praeger *v.* Bristol and Exeter Railway Company	Law Rep. 7 C. P. at pp. 323, 336	88
Pust *v.* Dowie	5 B. & S. 20, 33	215

Q.

Quarman *v.* Burnett	6 M. & W. 499	281
Quebec Marine Insurance Company *v.* Commercial Bank of Canada	Law Rep. 3 P. C. 234	457

R.

Randall *v.* Reaper	E. B. & E. 84	104
Rankin *v.* Potter	Law Rep. 6 H. L. 83	186
Rashdall *v.* Ford	Law Rep. 2 Eq. 750	4
Rawnsley *v.* Hutchinson	Law Rep. 6 Q. B. 305	373
Rayner *v.* Ritson	6 B. & S. 888	625
Readhead *v.* Midland Railway Company	Law Rep. 4 Q. B. 379, 380	104, 105, 106, 110, 111, 112, 457
Reeve *v.* Attorney General	1 Eden, Ch. 177	70
Reg. *v.* Archbishop of Canterbury	6 E. & B. 546	565
—— *v.* Ardley	Law Rep. 1 C. C. 301	304
—— *v.* Ball	Car. & M. 249	304
—— *v.* Barrett	Law Rep. 2 C. C. 81	412
—— *v.* Barrow	Law Rep. 1 C. C. 156	412, 414
—— *v.* Beaumont	Dears. Cr. C. 270	144
—— *v.* Birmingham	10 Q. B. 116	550, 558
—— *v.* Blanshard	30 J. P. 280	609
—— *v.* Bryan	Dears. & B. Cr. C. 265	304
—— *v.* Burrows	11 Cox, 258	512
—— *v.* Callum	Law Rep. 2 Cr. C. 28	144
—— *v.* Cambrian Railway Company	Law Rep. 6 Q. B. 422	227, 236, 237, 238

		PAGE
Reg. *v.* Case	1 Den. C. C. 580	412, 413
— *v.* Chorlton-on-Medlock	1 Q. B. D. 62	367
— *v.* Chorlton Union	Law Rep. 8 Q. B. 5	205
— *v.* Collins	2 Q. B. D. 30.	43
— *v.* Cooper	Law Rep. 2 C. C. 123	161, 169
— *v.* Cross	19 L. T. 35	35, 36
— *v.* Dayman	7 E. & B. 672, 678	518
— *v* De Berenger	3 M. & S. 67	54, 59, 61, 64
— *v.* Deer	L. & C. C. C. 240	309, 310
— *v.* Dixon	3 M. & S. at p. 15	65
— *v.* Dugdale	Dearsley & Pearce, Cr. C. 54	571
— *v.* Eagleton	Dears. Cr. C. 515	304
— *v.* Featherstone	Dears. Cr. C. 369	309, 310
— *v.* Fletcher	Bell, Cr. C. 63	412
— *v.* Fordam	11 A. & E. 73	205
— *v.* Giles	L. & C. 502	512, 513, 515
— *v.* Gill	2 B. & Ald. 204	60, 63
— *v.* Goldsmith	Law Rep. 2 C. C. 74	55, 67
— *v.* Gompertz	9 Q. B. 824	56, 57, 60, 63
— *v.* Greenacre	8 C. & P. 35	310
— *v.* Harris	Dears. Cr. C. 344	144
— *v.* Hazelton	Law Rep. 2 C. C. 134	512, 513
— *v.* Henson	1 Dears. Cr. C. 24	334
— *v.* JJ. Bristol	3 E. & B. 479, n.	519
— *v.* JJ. Worcester	3 E. & B. 477	518
— *v.* Justices of Westmoreland	1 D. & L. 178	373
— *v.* Keena	Law Rep. 1 C. C. 113	144
— *v.* Kerrigan	1 L. & C. Cr. C. 383	304
— *v.* Leigh	8 Cox, Cr. C. 233	304
— *v.* Leith	1 E. & B. 121	585
— *v.* Llewellyn	12 Mod. 445	140
— *v.* Long	1 Q. B. 740	373
— *v.* Mather	2 C. & K. 931	144
— *v.* Maude	6 Jur. 646	133, 134
— *v.* Mayor of Rochester	7 E. & B. 910	205
— *v.* Morgan	Law Rep. 7 Q. B. 26	33
— *v.* Morrison	1 E. & B. 150	585
— *v.* Murray	5 C. & P. 145	144
— *v.* Mutters	L. & C. Cr. C. 511	310
— *v.* New Sarum	7 Q. B. 941	549
— *v.* New Windsor	1 Q. B. D. 152	546
— *v.* Pearcy	17 Q. B 902, n.	613
— *v.* Peck	9 A. & E. 686	55
— *v.* Pratt	8 Cox, Cr. C. 334	304
— *v.* Prince	11 Cox, Cr. C. 193	310
— *v.* Roebuck	Dears. Cr. C. 515	304
— *v.* Rosenberg	1 C. & H. 233	310
— *v.* Shrewsbury and Hereford Railway Company	25 L. T. (O.S.) 65	372
— *v.* Sillem	10 H. L. C. 704	44
— *v.* Steel	2 Q. B. D. 37	43, 44, 45, 46, 47
— *v.* Stone	Law Rep. 1 Q. B. 529	155
— *v.* St. Leonard, Shoreditch	Law Rep. 1 Q. B. 21	523
— *v.* St. Martin-in-the-Fields	17 Q. B. 149	605
— *v.* Summers	Law Rep. 1 C. C. 183	306
— *v.* Thorpe	Dears. Cr. C. 562	144
— *v.* Warburton	Law Rep. 1 C. C. at p. 274, 276	54, 59
— *v.* Whaddon	Law Rep. 10 Q. B. 230	585

		PAGE
Reg. *v.* Whitby Union	Law Rep. 5 Q. B. 325	523
—— *v.* Willis	Law Rep. 1 C. C. 363	306
—— *v.* Wilson	9 C. & P. 27	144
Rex *v.* Barnard	7 C. & P. 784	512
—— *v.* Brighton Gas Company	5 B. & C. 466	585
—— *v.* Burnett	4 M. & S. 272	333, 334
—— *v.* Chelsea Waterworks Company	5 B. & Ad. 156	585
—— *v.* Christopher Layer	16 How. St. Fr. 93, at p. 317	570
—— *v.* Commissioners of Pagham Level	8 B. & C. 355	291
—— *v.* Commissioners of Sewers for Essex	1 B. & C. 477, 482	292
—— *v.* Curll	17 How. St. Tr. 154	571
—— *v.* Dixon	3 M. & S. 11	54
—— *v.* Fowle	4 C. & P. 592	55
—— *v.* Frieston	5 B. & Ad. 597	519
—— *v.* Fuller	1 Ld. Raym. 509	55
—— *v.* Glyde	2 M. & S. 323	367
—— *v.* Goldstein	3 B. & B. 201	571
—— *v.* Gregory	4 T. R. 240, n.	605
—— *v.* Greenhill	4 Ad. & E. 624	80
—— *v.* Gwyer	2 Ad. & E. 216	367
—— *v.* Henson	1 Dears. Cr. C. 24	333
—— *v.* JJ. of Monmouth	7 D. & R. 334	518
—— *v.* Perrott	2 M. & S. 379	56, 57, 66
—— *v.* Tewkesbury	13 East, 155	585
—— *v.* Trent, &c., Navigation Company	4 B. & C. 57	585
—— *v.* Vantandillo	4 M. & S. 73	333, 334
Reynoldson *v.* Blake	1 Ld. Raym. 192. 197	562
Richardson *v.* Willis	Law Rep. 8 Ex. 69	40
Riche *v.* Ashbury Carriage Company	Law Rep. 7 H. L. 653, 667	215
Ricketts *v.* Bodenham	4 A. & E. 433	563, 565
Ridgway *v.* Wharton	6 H. L. C. 238	321, 324
Roads *v.* Overseers of Trumpington	Law Rep. 6 Q. B. 56; 2 East, 154	585
Robert Marys's Case	9 Rep. 113 a	448
Roberts *v.* Humby	3 M. & W. 120	564
Rochfort *v.* Atherley	1 Ex. D. 511	610
Rodger *v.* Comptoir d'Escompte de Paris	Law Rep. 2 P. C. 393	377, 378, 381, 382
Rosewell *v.* Prior	2 Salk. 460	620
Routh *v.* Macmillan	2 H. & C. 750	457
Ruck *v.* Williams	3 H. & N. 308	148

S.

Sacheverell's, Dr., Case	15 How. St. Tr. at p. 466	570, 571
Sadgrove *v.* Kirby	6 Term Rep. 483	447
Saint *v.* Pilley	Law Rep. 10 Ex. 137	358
Sargent, Ex parte	Law Rep. 17 Eq. at 276	466, 474
Scholes *v.* Hargreaves	5 Term Rep. 46, at p. 48	450
Shadwell *v.* Hutchinson	4 Car. & Pa. 333; 2 B. & Ad. 97	620
Sheehy *v.* Professional Life Assurance Company	2 C. B. 211, 291	537
Sherwin *v.* Shakespeare	5 De G. M. & G. 517	191, 192
Simpson *v.* Crippin	Law Rep. 8 Q. B. 14	183
——— *v.* Eggington	10 Ex. 845	487
Siner *v.* Great Western Railway Company	Law Rep. 3 Ex. 150; Law Rep. 4 Ex. 117	86, 87, 88, 89

		PAGE
Smith *v.* Edge	2 H. & C. 659	628
—— *v.* Goldsworthy	4 Q. B. 430	215
—— *v.* Green	1 C. P. D. 92	104, 111, 332
—— *v.* Hughes	Law Rep. 6 Q. B. 597	215
—— *v.* Lloyd	9 Ex. 562	487
—— *v.* St. Michael, Cambridge	3 E. & E. 383	585, 586
—— *v.* Upton	6 Man. & G. at p. 252, 254	70
—— *v.* Warde	15 Sim. 56	71
—— *v.* Webster	3 Ch. D. 49	321
Southampton and Itchin Bridge Company *v.* Local Board of Southampton	8 E. & B. 801	148
Spain *v.* Cadell	8 M. & W. 129, at pp. 131, 132	627, 628, 629
Spiers *v.* Parker	1 T. R. 141	55
Staley *v.* Castleton	5 B. & S. 505	585
Stewart *v.* Steele	5 Scott, N. R. 927	505
—— *v.* West India and Pacific Steamship Company	Law Rep. 8 Q. B. 88; in Ex. Ch. Law Rep. 8 Q. B. 362	94
Stewart's Case	Law Rep. 1 Ch. 574, at pp. 585, 586	465, 477
Stockton and Darlington Railway Company *v.* Brown	9 H. L. C. 246	339, 343
Story *v.* Ashton	Law Rep. 4 Q. B. 476	281, 282
Sutton *v.* Temple	12 M. & W. 52	104
Swan, Ex parte	7 C. B. (N.S.) 400, at pp. 408, 431, 439	468, 470, 471, 473, 478
Sydserff *v.* Reg.	11 Q. B. 245	55, 60, 63

T.

Tarrabochia *v.* Hickie	1 H. & N. 183	183, 457
Tew *v.* Jones	13 M. & W. 12	191
Thomas *v.* Reg.	Law Rep. 10 Q. B. 31	70
—— *v.* Sylvester	Law Rep. 8 Q. B. 368	485, 489
Thompson *v.* London and North Western Railway Company	2 Nev. & Mac. 115	267
—— *v.* Taylor	6 T. R. 478	457
Thorpe *v.* Macauley	5 Madd. 218, at p. 229	525
Tupling *v.* Ward	6 H. & N. 749	526

V.

Varley *v.* Leigh	2 Ex. 446	485
Vaux *v.* Vollans	4 B. & Ad. 525	565
Villeboisnet *v.* Tobin	Law Rep. 4 C. P. 184	526
Vlierboom *v.* Chapman	13 M. & W. 230, at p. 238	426

W.

Wallis *v.* London and South Western Railway Company	Law Rep. 5 Ex. 62	265
Ward and Garfit's Case	Law Rep. 4 Eq. 189, at p. 196	466, 477, 479
Ward and Henry's Case	Law Rep. 2 Ch. at pp. 436, 437, 441, 442	465, 466, 470, 477, 478, 479

		PAGE
Ward, Ex parte	Law Rep. 2 Eq. 180	467
Warden *v.* Tye	2 C. P. D. 74	404
Warner *v.* Murdoch	4 Ch. D. 750	606
Warwick *v.* Queen's College, Oxford	Law Rep. 6 Ch. 716	445, 446
Watkins *v.* Overseers of Milton	Law Rep. 3 Q. B. 350	587
Weatherhead *v.* Drewry	11 East, 168	546
Wellesley *v.* Duke of Beaufort	2 Russ. 1	81, 82
West London Extension Railway Company *v.* Fulham	Law Rep. 5 Q. B. 361	372
Whatman *v.* Pearson	Law Rep. 3 C. B. 237	281
Whitaker *v.* Forbes	1 C. P. D. 51	210
Whitcher *v.* Hall	5 B. & C. 269	215
Whitelock *v.* Hutchinson	2 M. & R. 205	450
White's Case	Law Rep. 3 Eq. 84	466
Wieler *v.* Schilizzi	17 C. B. 619, 622	107
Wigens *v.* Cook	28 L. J. (C.P.) at p. 315	627
Williams, Ex parte	4 B. & C. 313	564
——— *v.* Millington	1 H. Bl. 81	359
Wilson *v.* Bank of Victoria	Law Rep. 2 Q. B. at p. 213	93
——— *v.* Mayor of Bolton	Law Rep. 7 Q. B. 105	390
Woodcock *v.* Titterton	12 W. R. 864	487
Woodhouse *v.* Shepley	2 Atk. 535	632
Worms *v.* Storey	11 Ex. 427	456
Worthington *v.* Jeffries	Law Rep. 10 C. P. 379	563

Y.

Yarborough *v.* Bank of England	16 East, 6	537
York, The Dean of, Re	2 Q. B. 1	564
Young *v.* Davis	7 H. & N. 760; 2 H. & C. 197	148

Z.

Zenobio *v.* Axtell	6 T. R. 162	570

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

AND BY THE

COURT FOR CROWN CASES RESERVED

XL VICTORIA.

HIRSCHFELD *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. 1876 *Nov.* 10.

Deed—Fraudulent Representation as to Effect of Release.

Claim, stating that the defendants were carriers of passengers by railway, and the plaintiff was received by them as a passenger in an express train which by their negligence came into collision with an engine and he was injured. Defence, that after the collision the plaintiff accepted money from the defendants' officer in satisfaction of his cause of action, and executed a release. Reply, that the defendants' officer procured the plaintiff to execute the release by fraudulently representing to him for that purpose that his injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from the defendants, and that the plaintiff was thereby induced to execute the deed, and that after he had executed it his injuries turned out to be of a more serious nature than he had anticipated:—

Held, that the reply was good, as it contained a separate and independent statement that the plaintiff was induced to execute the deed in consequence of a fraudulent representation that his injuries were of a trivial and temporary character.

Semble, that a fraudulent representation as to the effect of a deed may be relied upon as a defence to an action upon the deed.

CLAIM. The defendants are carriers of passengers upon a railway from Victoria Station, London, to Balham.

1876

HIRSCHFIELD v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO.

In January, 1876, the plaintiff was received by the defendants as a second-class passenger holding a season ticket, to be by them safely and securely carried in an express train which started from Victoria Station for Balham.

Owing to the negligence of the defendants in the management of their railway line, and of the trains and engines running thereon, the express train in which the plaintiff was travelling from Victoria Station to Balham aforesaid ran into or otherwise came into collision with an engine at a short distance from Victoria Station. The plaintiff was thrown from his seat by the collision, and was injured.

Defence. Shortly after the happening of the collision, on the 3rd of February, 1876, one of the officers of the defendants who was then duly authorized by them, called upon the plaintiff, for the purpose of ascertaining from him whether he intended to make any claim against the defendants, arising out of the collision, and to pay to him any reasonable sum which might be agreed upon between them in accord and satisfaction of such claim. At such interview the plaintiff informed the officer that he intended to make a claim against the defendants arising out of the collision, and after some discussion upon the subject between the plaintiff and the officer, it was ultimately agreed between the plaintiff and the officer, for and on behalf of the defendants, that in consideration that the defendants would pay to the plaintiff (as they then accordingly did through their said officer) a sum of 3*l.* 3*s.* in full satisfaction and discharge of all cause of action which he then had, or at any time or times thereafter might have, against the defendants, on account of or in any way incidental to or connected with the said collision, he, the plaintiff, would (as he then accordingly did) accept such sum from the defendants in full satisfaction and discharge of such cause of action, and would then and there make and execute (as he then and there in fact did) a deed of release to the defendants from such causes of action (setting out the release, which was in very general terms).

Reply. That the officer procured the plaintiff to execute the deed of release by fraudulently representing to him for that purpose that his injuries were of a trivial and a temporary nature, and that if they should afterwards turn out to be more serious

than he then anticipated he would still, even though he had executed the deed, be in a position to obtain and would obtain further compensation from the defendants in respect thereof, and that the plaintiff, fully believing in the representations and acting upon the faith thereof, was induced thereby to execute the deed, and then executed the same upon and subject to the express condition that he should not thereby exclude himself from further compensation from the defendants, if his injuries should turn out to be more serious than he then anticipated. After the execution of the deed the injuries suffered by the plaintiff in the collision turned out to be of a more serious nature than was anticipated by the plaintiff at the time of his executing the deed, &c.

Demurrer and joinder.

Jeune, in support of the demurrer. The law is, no doubt, clear that if a man is induced to execute a deed by having its terms fraudulently misstated to him, he has a good defence to an action upon the deed. This rule would apply if a blind or illiterate man before signing the deed was induced to believe that its contents were altogether different from what they actually were. In such a case he cannot be said to have executed the real instrument. The decisions are collected in *Foster* v. *Mackinnon* (1), where the defendant was induced to put his name on the back of a bill by a fraudulent representation that he was signing a guarantee. But in the present case it is merely suggested that the meaning, not the words, of the release was misrepresented, and the rule does not apply. In *Lewis* v. *Jones* (2) it appeared that the defendant had become a party to a promissory note for the accommodation of the maker, and that the plaintiff, the indorsee, afterwards signed an agreement to accept a composition from the maker, on a representation that the defendant would continue liable. It was held that the representation, being as to the legal effect of the agreement, was immaterial. In delivering judgment, Bayley, J., says (referring to the representation that the surety would continue liable), "That however was a misrepresentation merely of the legal effect of the agreement. Now every man is supposed to know the

(1) Law Rep. 4 C. P. 704. (2) 4 B. & C. 506.

1876

HIRSCHFIELD v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO.

legal effect of an instrument which he signs, and therefore this must be taken to be a representation as to a fact within the knowledge of the creditor." Here there was no misunderstanding as to the words of the release, or as to its immediate effect.

[LUSH, J. The decision in *Lewis* v. *Jones* (1) seems to have proceeded on the ground that there was no proof of fraud. Surely, if a solicitor persuaded a man to convey away his property under a fraudulent misstatement as to the effect of the conveyance, it could not be said that the client must be taken to know the law.]

In *Beattie* v. *Lord Ebury* (2) Mellish, L.J., says, "Though I have found no case at law, there is a case in equity which clearly shews that the rule in this Court is that a person cannot be made liable for making a misrepresentation, unless it is a misrepresentation in point of fact and not merely in point of law." The Lord Justice then refers to *Rashdall* v. *Ford* (3), where it was decided that the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of matters of law.

[LUSH, J. That does not seem to have been a case of fraud like the present.]

In the modern text-books upon the law of contract, Chitty on Contracts, 10th ed. pp. 626, 631; Leake on Contracts, p. 182, the law is stated to be that a fraudulent misrepresentation as to the effect of a document affords no ground for relief in law, though it may in equity.

[LUSH, J. By the Supreme Court of Judicature Act, 1873, s. 24, subs. 1, this Court may give equitable relief against any deed.]

The plaintiff has not in form applied for such relief.

Wood Hill, for the plaintiff. In the passage cited from *Lewis* v. *Jones* (1), Bayley, J., could only have meant that a man must primâ facie be taken to understand the meaning of a paper which he signs. Upon the main question there is not much authority, but there can be no difference in principle between a misrepresentation as to the contents of a document and as to its meaning. More-

(1) 4 B. & C. 506. (2) Law Rep. 7 Ch. at p. 802.
(3) Law Rep. 2 Eq. 750.

over, the introductory part of the reply alleges a misrepresentation as to the extent of the plaintiff's injury.

Jeune, in reply. It must be admitted that in *Edwards* v. *Brown* (1), a later case than *Lewis* v. *Jones* (2), Bayley, J., says (p. 312), "I agree that whatever shews that the bond never was the deed of the defendant may be given in evidence upon non est factum. But if the party actually executes it, and was competent at the time to execute it, and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, *and though he might have been entitled to avoid the bond by stating that he was so misled*, it nevertheless became, by the execution, the deed of the defendant." But it will be observed that all the legal authors of later date join in recognising the distinction between the two classes of representations.

MELLOR, J. This case has been extremely well argued, and the counsel for the defendants has very properly brought before us the case of *Edwards* v. *Brown*. (1) I think that there is nothing to prevent us from giving full effect to the misrepresentation mentioned in the early part of the reply, and though it might have been more clearly described, I think it must be understood to mean that there were two representations: one that the injuries from which the plaintiff was suffering were of a trivial and temporary character, and the other as to the effect of the release. It is alleged, in fact, that there was a mis-statement as to the circumstances, and further, as to the operation of the deed. I confess that I am very glad that we can give our decision upon the ground that there is enough in the early part of the reply to make it good, though I think that there is nothing in law, and certainly nothing in equity, which says that a man who has been induced to execute a deed in consequence of a misrepresentation as to its effect has no defence.

LUSH, J. I do not think that we need determine the question which has mainly been argued, whether a fraudulent representation as to the effect of a deed can be relied upon as a defence to an action upon the deed, but I should not have the least hesitation in

(1) 1 C. & J. 307. (2) 4 B. & C. 506.

1876

HIRSCHFIELD v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO.

holding that it does constitute a defence; and I think that we have been referred to no authority which should induce us to decide otherwise.

Judgment for the plaintiff.

Solicitors for plaintiff: *Neal & Philpot.*
Solicitors for defendants: *Norton, Rose, & Co.*

Nov. 10.

GLEGG *v.* GILBEY.

Bankruptcy—Composition Deed—Liability of Surety—Construction.

6 Ch D 46
Ch D. 124

B. having presented a petition for the liquidation of his affairs, the statutory majority of his creditors passed a resolution accepting a composition payable in three instalments, the last instalment to be guaranteed by the defendant. The defendant signed a guarantee accordingly, and a deed was made between B., the defendant, and certain persons called "the inspectors." The creditors of B. were also made parties to the deed, but some of them did not execute it. By the deed, after reciting that it had been agreed that until payment of the composition B. should carry on his business under the inspectors, it was provided that if B. should make default in the payment of it, or if it should appear to the inspectors, from the state of his business, or otherwise, that the instalments would not be duly met, it should be lawful for them to apply to the Court of Bankruptcy to adjudge him a bankrupt, and without prejudice to this right it should be lawful for them in any such event to require him to assign all his property to them, as if they were trustees under liquidation proceedings, and further, that "in the event of B. being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed before full payment of the composition, the defendant should be released from his guarantee." B. having made default in payment of the second instalment, was made bankrupt on the petition of a creditor who was not bound by the resolution, and had not executed the deed. After the bankruptcy he made default in payment of the third instalment:—

Held, that the defendant was liable, as he could only be released from his guarantee by a bankruptcy procured by the inspectors under the provisions of the deed.

ACTION for the recovery of 2476*l.* 11*s.* 9*d.* on a guarantee given by the defendant for one C. Bedell. The following case was stated for the opinion of the Court.

3. On the 19th of October, 1874, Bedell presented a petition under the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement or composition with his creditors in pursuance of the provisions of the Act.

4. At a first general meeting of the creditors of Bedell, under the provisions of the Act, on the 17th of December, 1874, the requisite statutory majority of the creditors, by an extraordinary resolution, resolved:—

(1.) That a composition of 7*s.* 6*d.* in the pound should be accepted in satisfaction of the debts due to the creditors from the said Charles Bedell.

(2.) That such composition should be payable as follows: 4*s.* in three months, 2*s.* in six months, and 1*s.* 6*d.* in nine months, from the date of the registration of those resolutions, the last of such instalments to be guaranteed by Mr. H. Gilbey (the defendant), such guarantee to be filed with those resolutions.

(3.) That the composition should be secured by the promissory notes of the debtor, to be dated on the day of the date of the registration of those resolutions, and to be delivered by the debtor to Mr. J. Glegg (the plaintiff) for the use of and to distribute to the several creditors.

(4.) And that until payment of the composition the debtor should carry on his business under the inspection of Messrs. Young, Pearson, and Goldsmith, who were thereby appointed inspectors, and that a deed of inspectorship, to contain all usual and proper clauses, should be forthwith prepared by the debtor's solicitor, and be approved by Mr. Sorrell, for and on behalf of the inspectors and creditors, the form and contents of such deed to be determined, in the event of difference, by a counsel to be nominated by the inspectors.

5. On the 21st of December, 1874, the defendant, pursuant to the resolution, gave to the plaintiff his guarantee for the payment of the third instalment.

6. The resolution was duly passed and confirmed by the creditors on the 31st of December, 1874, and the guarantee was duly filed with the resolution, and the resolution was afterwards duly registered pursuant to the Act, and Bedell made, signed, and delivered as hereinafter mentioned to the creditors, or to the plaintiff, for distribution to the creditors of Bedell, the several promissory notes stipulated for by the resolution.

7. The number of the creditors whose names and addresses and the amount of whose debts were shewn in the statement of Bedell

1876

GLEGG v. GILBEY.

produced at the meetings at which the resolution was passed, and who became and were bound by the resolution, was fifty-three.

8. After the resolution and guarantee were registered and filed as aforesaid, a deed, dated the 8th of March, 1875, was made and entered into between Bedell of the first part, the defendant of the second part, and David Hill Young, Charles Froggatt Pearson, and Walter Charles Goldsmith, therein called the inspectors, of the third part. The parties to the deed of the fourth part were therein expressed and described by the words "the creditors of the said C. Bedell," but only fifteen of the creditors of Bedell in fact executed the deed.

The deed recited the resolution previously mentioned, and, together with several provisions as to the management of the debtor's business, contained the following proviso: "Provided always, and it is hereby agreed and declared, that if the said C. Bedell shall make default in the observance or performance of his covenants herein contained, or in the payment of the aforesaid promissory notes respectively, as and when the same shall become payable, or if it shall appear to the inspectors from the state or position of the business or affairs of the said C. Bedell or otherwise that the aforesaid instalments of the said composition or any of them will not be duly met or provided, or that the composition agreed to by the aforesaid resolutions cannot be carried into effect, it shall be lawful for the inspectors to apply to the Court of Bankruptcy to adjudge the said C. Bedell a bankrupt, and, without prejudice to their right to apply to the Court as aforesaid, it shall be lawful for the inspectors in any such event as aforesaid by notice in writing to require the said Charles Bedell to convey and assign all his property and effects to the inspectors, and he shall thereupon convey and assign the same accordingly, and the inspectors shall thenceforth have the same rights and powers and perform the same duties with respect to such property and effects as if they were the trustees under proceedings for liquidation of the affairs of the said C. Bedell by arrangement under the Bankruptcy Act, 1869, and the property of the said C. Bedell shall be distributed accordingly." And after certain regulations as to the inspectors, it proceeded, "provided always, and it is hereby agreed that in the event of the said

C. Bedell being adjudicated bankrupt, or of a conveyance or assignment of his property and effects being made or required under the provisions of these presents, before full payment of all the aforesaid promissory notes, the said H. P. Gilbey (the defendant) shall thereupon stand released from his aforesaid guarantee."

10. Two of the inspectors, Mr. Young and Mr. Goldsmith, were creditors of Bedell, and the third inspector, Mr. Pearson, was clerk to another creditor, Mr. Arnold, and held his proxy at the meetings.

11. The deed was settled by counsel on behalf of the debtor, and by counsel instructed by Mr. J. B. Sorrell. The terms of the same were finally approved by Mr. J. B. Sorrell, acting for and on behalf of the inspectors and creditors under the authority conferred upon him by the resolution.

11A. The facts found in the two next following paragraphs are stated subject to all questions as to their admissibility in evidence against the defendant.

12. The terms of the intended deed were not discussed at the meetings of creditors. The plaintiff was never consulted as to the terms of the deed, and was not aware until after it was brought to him, as hereinafter mentioned, that it contained a proviso releasing the defendant in the event of the bankruptcy of Bedell. Several of the fifteen creditors who executed the deed did so in ignorance of the existence therein of the said proviso.

13. The deed, after it had been executed by the fifteen creditors before mentioned, was brought by Bedell to the plaintiff, together with the promissory notes in favour of those of the fifty-three creditors who had not executed it, for the purpose of his procuring their signatures to the deed and distributing the promissory notes to them. The plaintiff then for the first time became aware of the existence of the proviso for the release of the surety, and considered it an improper clause, and on that ground he declined to ask any creditors to sign the deed, and though he distributed the promissory notes among them, did not present the deed to them for execution.

14. When creditors agree to accept a composition upon their debts it is not unusual to provide, by an inspectorship deed, that the debtor's affairs shall be carried on under inspection until the

1876

GLEGG v. GILBEY.

composition shall have been paid; but it is unusual to provide for such inspection when payment of the composition, or of any part of it, is guaranteed by a surety, and consequently inspectorship deeds rarely contain any clauses relating to a surety by whom payment of a composition is guaranteed.

15. In the case of an ordinary composition deed, when one of the parties to the deed guarantees the payment by the debtor of the composition in whole or in part, a clause releasing the surety in the event of the debtor's bankruptcy is not a usual clause.

16. The inspectors acted upon the deed, and Bedell was allowed thereunder to continue in possession of and carry on his trade and business.

17. The promissory notes so made by Bedell and delivered to the creditors for and in respect of the first instalment were duly paid. He had not sufficient means to pay the promissory notes made by him and delivered in respect of the second instalment, and default was made by him in payment thereof.

18. W. Dawe and J. Dawe, who were creditors of Bedell at the time of the passing and confirming of the resolution, and whose names and addresses and the amount of the debts due to whom were not shewn in the statement of the debtor produced at the meeting at which the resolution was passed, and who were therefore not bound by such resolution and who had not executed the deed of inspectorship, did, on the 1st of October, 1875, petition and institute proceedings in bankruptcy against him in respect of the debt, and on the 14th of October, 1875, Bedell was adjudicated a bankrupt. The act of bankruptcy was the non-compliance by Bedell with a trader debtor's summons, served upon him by the Messrs. Dawe in respect of their debt. A trustee was appointed under the bankruptcy.

20. Some of the creditors who were bound by the resolution proved against the estate of Bedell under the bankruptcy.

21. After the adjudication Bedell made default in the payment of the last instalment of the composition, and the same has not been paid by him.

22. The defendant has not paid to the plaintiff the amount of the third instalment according to his guarantee, for the use of and to distribute to the creditors of Bedell.

1876

GLEGG v. GILBEY.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover from the defendant the amount of the third instalment under the defendant's guarantee.

C. Russell, Q.C. (*Holl* with him), for the plaintiff, was stopped.

Benjamin, Q.C. (*Willis* with him), for the defendant. In the events which have happened, it was never intended that the defendant, as surety, should remain liable. The Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 126, after providing that rules of Court may be made as to the acceptance of a composition by resolution of the creditors, enacts that upon proof that a composition cannot, in consequence of legal difficulties, or for any other cause, proceed without injustice to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly. The legislature evidently consider that the bankruptcy is to put an end to all the liabilities under the composition. Further, it must be recollected that the effect of the default in the payment of the second instalment was to enable the creditors to sue for the whole amount of their debts and to prove for such amount under the bankruptcy. But it is surely inequitable to apply the whole of the debtor's assets to those debts, instead of the composition, and then to proceed against the surety; the result is to prevent the scheme of the composition deed and the intention of the surety from being carried out.

[LUSH, J. You are adding to the guarantee of the defendant a qualification which never existed. Besides, the creditors may not care to prove under the bankruptcy, since they can recover the whole amount of the composition from the surety.]

It is well known that it is usual for a surety who guarantees payment of a composition to protect himself by a bill of sale of the debtor's property, and *Ex parte Burrell* (1) shews that there is nothing illegal in such an arrangement.

Secondly, the deed in express terms or by necessary inference exempts the defendant from liability. It empowers the inspectors to take the estate from the debtor if the composition cannot be carried out, or to make him a bankrupt. Later on there is a proviso that in the event of the debtor being adjudicated bankrupt

(1) 1 Ch. D. 537.

1876

GLEGG v. GILBEY.

the defendant is to be released. It will be said that this must mean being made bankrupt under the provisions of the deed. But there is no ground for putting such a restricted meaning on the words. Why is it necessary to interpolate after "bankrupt" the words "under the provisions of these presents"? The intention was that the suretyship should only last while the debtor was in possession of his property; when that property is swept away by a bankruptcy, the defendant is released.

C. Russell, Q.C., in reply. The answer to the defendant's argument is that he ought to have protected himself by express provision, and, not having done so, must take the consequences. As to the effect of taking away the assets on which the defendant relied to secure the composition, the same consequence would follow if a subsequent creditor were to put the estate into bankruptcy, in which case it would be impossible to say that the defendant was released.

MELLOR, J. I think our judgment must be for the plaintiff. It appears from the facts stated in the case that there was an arrangement for winding up the affairs of Bedell, the debtor, and that this arrangement was assented to by the necessary majority of his creditors; and a deed to which the defendant was party was executed for the purpose of carrying out the arrangement. By one of the provisions of this deed the debtor was to pay a composition on his debts in three instalments, for the last of which the defendant became security. I think the defendant must be taken to have inquired into all the circumstances of the arrangement; the number of creditors, the amount of their debts, and it appears that the form and contents of the deed were to be settled in case of difference by a counsel to be nominated by the inspectors, and that they were settled accordingly. Upon the construction of this deed we are called upon to decide, and I cannot but think that if we were to put upon it the construction for which Mr. Benjamin contends there would never be a composition deed upon which the parties could rely. I think that what was contemplated by the proviso, "In the event of the said Charles Bedell being adjudicated bankrupt, or of a conveyance or assignment of his property and effects being made or required under the provisions

of these presents," is explained by the previous clause enabling the inspectors to make the debtor bankrupt if he should fail in payment of the composition. This is the character of the bankruptcy which is to make void the agreement of the surety. To read the proviso as if it applied to any kind of bankruptcy whatever would be to depart from the whole scheme of the deed.

LUSH, J. I am of the same opinion. A statutory majority of the creditors of the bankrupt agreed to accept a composition of 7*s.* 6*d.* in the pound, payable by three instalments, and the defendant guaranteed the payment of the last of these instalments. It was arranged that the bankrupt should carry on his business under the inspection of certain specified persons; and a deed of inspectorship was prepared for the purpose of carrying out these provisions, which was executed by the bankrupt and the defendant. The bankrupt failed to pay the second instalment, and one of the dissenting creditors petitioned and obtained an adjudication in bankruptcy against him. This bankruptcy had no relation to the provision in the deed by which the inspectors were entitled to make the debtor a bankrupt if he made default in the payment of the composition. It was founded upon an act of bankruptcy by the debtor, and upon the service of a summons in the ordinary manner. Mr. Benjamin has argued that the bankruptcy, by its own force, discharged the surety from his obligation. I am utterly unable to see how this can be the case. The creditors were only affected to this extent, that a bankruptcy remitted them to their original rights, and enabled them to prove for the whole amount of what was due to them. But this was an option only, they were not bound to do so; they could, and probably would, if they had a surety, proceed against him for the whole amount of their debts. It was argued that it was very hard that the assets should be taken from the debtor on which he relied to enable him to pay the composition, and that the surety should still continue liable. The answer is that the surety must look to this when he undertakes to secure the payment of a composition. There is no hardship in the defendant being obliged to pay according to his contract.

Then comes another question, as to the construction of the deed. By the deed the inspectors took power in the event of any

1876

GLEGG v. GILBEY.

default in the payment of the composition to transfer the estate into the Court of Bankruptcy, or to require the debtor to assign all his property to them. There was also a proviso that, "in the event of the debtor being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of these presents before full payment of the composition, the defendant should stand released from his guarantee." Now does this mean a bankruptcy brought about by the instigation of the inspectors under the deed, or an independent bankruptcy obtained at the instance of any one of the creditors? I cannot doubt that it means a bankruptcy through the intervention of the inspectors. The clauses of the deed between the one enabling the inspectors to make the debtor a bankrupt, and the clause relating to the release of the defendant, are mere clauses respecting the details of the arrangement. Moreover, the words "in the event of the debtor being adjudicated bankrupt, or of a conveyance being required under the provisions of these presents" shew that there is some affinity between the two occurrences, and that by each is meant something brought about by the inspectors. It is only in the event of a bankruptcy under the preceding clause that the composition is merged. An ordinary bankruptcy would by itself have no effect on the defendant's liability.

Judgment for the plaintiff.

Solicitors for plaintiff: *Lewis, Munns, & Longden.*
Solicitor for defendant: *Broughton.*

FINCH AND ANOTHER *v.* THE GUARDIANS OF YORK UNION. 1876

Nov. 10.

Maintenance of Criminal Lunatic in Asylum — Liability of Guardians — Lunatic remaining more than One Year in Asylum—16 & 17 *Vict.* c. 97, s. 96.

By 16 & 17 Vict. c. 97, s. 96, it shall be lawful for the justice by whom any pauper lunatic is sent to an asylum, registered hospital, &c., under the powers of this Act, or for any two justices of the county or borough, &c., to make an order upon the guardians of the union or parish, or overseers of the parish (if not in a union or under a board of guardians), from which such lunatic is or has been sent for confinement, for payment to the treasurer, officers, or proprietor of the asylum, &c., of the reasonable charges of the lodging, maintenance, &c., of such lunatic in such asylum, hospital, &c., and any such order may be retrospective or prospective, or partly retrospective and partly prospective. By. s. 97 two justices may inquire into and adjudge the settlement of a pauper lunatic, and order the guardians of the union or overseers of the parish in which he is adjudged to be settled to pay the guardians of any union or overseers of any parish money paid to the treasurer, officer, &c., of the asylum, &c., for lodging, &c., incurred within twelve months previous to the date of the order:—

Held, that under s. 96 an order may be made for the payment of the expenses of the maintenance of a lunatic for a period of more than twelve months previous to the date of the order.

CASE stated after writ without pleadings:—

1. The action is brought by plaintiffs upon an order made by two visiting justices of plaintiffs' asylum at Fisherton, near Salisbury, and dated the 23rd of October, 1875, by virtue of powers conferred upon them by the Criminal Lunatics Act, 1867 (30 Vict. c. 12), and the Lunatics Asylums Act, 1853 (16 & 17 Vict. c. 96), for the payment of the sum of 102*l.* 14*s.*, for the support of one James Powell, from the 23rd of June, 1873, to the 23rd of October, 1875, and of a further sum of 11*l.* 18*s.* for the support of Powell from the 23rd of October, 1875, to the 29th of January, 1876, being at the rate of 17*s.* a week.

2. The order recited that one J. Powell was tried and convicted of larceny at the city sessions, holden at York, in the said county, on the 18th of October, 1869, and was sentenced to sixteen months' imprisonment with hard labour, and in pursuance of such sentence was imprisoned in the gaol at York Castle, and was afterwards duly certified to the Home Secretary to have become insane, and that the Home Secretary by an order made on the 28th of Sep-

1876

FINCH v. GUARDIANS OF YORK UNION.

tember, 1870, directed that Powell be received into the Fisherton House Lunatic Asylum, Wilts, until further order should be made therein; that Powell was received into the asylum, and the time for which he was sentenced to be imprisoned expired on the 18th of February, 1871, but he had ever since remained a patient in the asylum, and was not fit to be discharged; that it had been proved by Dr. J. A. Lush and Dr. W. C. Finch, the licensed proprietors of the asylum, that there was a balance due to them in respect of their claim for the lodging, maintenance, clothing, medicine, and care of Powell in the asylum since the expiration of his sentence, and up to the 23rd of October, 1875, the sum of 102*l.* 14*s.* It then ordered the defendants to pay the sum of 102*l.* 14*s.*, and 17*s.* per week from the 23rd of October, 1875, so long as Powell should remain in the asylum or until further order.

3. Powell was convicted of felony at York on the 18th of October, 1869, and sentenced to sixteen months' imprisonment with hard labour.

4. He became insane, and was removed to plaintiffs' asylum on the 28th of September, 1870, by an order of the Secretary of State made under 27 & 28 Vict. c. 29, amending 3 & 4 Vict. c. 54.

5. Powell's sentence expired on the 18th of February, 1871, when, as he was still insane, he became in the position of a "lunatic wandering at large in the place where the offence was committed," that is, York.

6. The corporation of York, through their treasurer, paid for the maintenance of Powell in plaintiffs' asylum until the expiration of his sentence, and afterwards until June, 1873, when they refused to pay for his support any longer.

7. The plaintiffs, on the 23rd of October, 1875, applied to two visiting justices of their asylum, and obtained the order previously mentioned.

8. The order was duly served upon the defendants, who refused to pay the sums therein ordered to be paid by them.

9. The plaintiffs brought this action under 16 & 17 Vict. c. 97. (1)

(1) By 16 & 17 Vict. c. 97, s. 95: "When any pauper lunatic is confined under the provisions of this Act, he shall for the purposes of this Act be

13. The question for the opinion of the Court is, are the plaintiffs entitled to recover the whole or any and what portion of their claim in this action?

Herschell, Q.C. (*Bromley* with him), for the plaintiffs. The order

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chargeable to the parish from which, or at the instance of some officer or officiating clergyman of which, he has been sent, unless and until such parish should have established under the provisions herein contained that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled, and every pauper lunatic who is chargeable to any parish shall while he resides in an asylum, registered hospital, or licensed house be deemed for the purposes of his settlement to be residing in the parish to which he is chargeable."

By s. 96: "It shall be lawful for the justice by whom any pauper lunatic is sent to an asylum, registered hospital, &c., under the powers of this Act, or for any two justices of the county or borough in which the asylum, registered hospital, &c., in which any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or for any two justices, being visitors of such asylum or licensed house, to make an order upon the guardians of the union or parish, or the overseers of the parish (if not in a union or under a board of guardians), from which, or at the instance of any officer or officiating clergyman of which, such lunatic is or has been sent for confinement, for payment to the treasurer, officer, or proprietor of the asylum, registered hospital, &c., of the reasonable charges of the lodging, maintenance, medicine, clothing, and care of such lunatic in such asylum, hospital, &c., and any such order may be retrospective or prospective, or partly retrospective and partly prospective, and the guardians or overseers on whom such order shall be made shall from time to time pay to the said treasurer, officer, or proprietor the charges aforesaid."

By s. 97: "It shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, &c., in which any pauper lunatic has, is, or has been confined, is situate, or to which such asylum wholly or in part belongs, or from any part of which any pauper lunatic is or has been sent for confinement, at any time to inquire into the last legal settlement of such pauper lunatic, and if satisfactory evidence can be obtained as to such settlement in any parish, such justices shall by order under their hands and seals adjudge such settlement accordingly, and order the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs, or of such parish, in case such parish be in a union or under a board of guardians, and if not, then the overseers of such parish, to pay to the guardians of any union or parish, or the overseers of any parish, all expenses incurred by or on behalf of such union or parish, &c. and of (sic) all moneys paid by such last-mentioned guardians or overseers to the treasurer, officer, or proprietor of the asylum, hospital, or house for the lodging, maintenance, &c., of such lunatic, and incurred within twelve calendar months previous to the date of such order."

1876

FINCH v. GUARDIANS OF YORK UNION.

was within the jurisdiction of the justices. The Act 16 & 17 Vict. c. 97, s. 96, enables them in express terms to make a retrospective order, and imposes no limit as to the extent to which the order may be retrospective. The fact that an express limit is imposed in the next section is in favour of the plaintiffs. Secondly, the defendants have mistaken their remedy. Their proper course was to apply to quash the order upon a certiorari.

Poland (*Grain* with him), for the defendants. If the plaintiffs' construction be right, it is possible to make an order for a lunatic's maintenance for a period of fifty years, while the union or parish could only, under s. 97, be recouped for one year's maintenance.

[LUSH, J. The Act does not require the proprietor of the asylum to obtain the order within any specified time.]

Sects. 96 and 97 ought to be read together, and if so read they shew that it was the intention of the legislature that the defendants' liability should not be extended beyond the space of twelve months.

PER CURIAM (Mellor and Lush, JJ.). There must be judgment for the plaintiffs. No such limit as that suggested is to be found in s. 96.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gregory, Rowcliffe, Rowcliffe, & Rawle.*
Solicitors for defendants: *Sharpe & Ullithorne.*

Nov. 21.

LEADBEATER *v.* CROSS AND OTHERS.

Devise— Vested or Contingent Estate—Construction.

A testator devised his real estate to his grandsons for life, with remainders to their sons in tail successively, and upon the death of the grandsons without issue he devised the estate to his three granddaughters in tail with benefit of survivorship, and in case the granddaughters should die without issue, leaving their father and mother, or either of them, surviving, then he devised the estate to the father and mother, and the survivor of them, for life, and after their death to T. M., J. A., and T. G. in fee. The grandsons survived the testator, but died without issue. One of them also survived the granddaughters, and one of the granddaughters survived both her father and mother:—

Held, that the devise of the estate for life to the father and mother of the

granddaughters was not a contingent remainder, and that the ulterior limitations took effect, notwithstanding the death of both father and mother, in the lifetime of the tenants in tail.

1876

LEADBEATER v. CROSS.

CLAIM. John Ashmore died on the 28th of February, 1821, seised in fee of a freehold farm at Sharnford, Leicestershire.

By his will, dated April, 1819, he devised all his hereditaments and real estate whatsoever situate at Sharnford, subject to certain annuities and charges, unto his two grandsons William Smith and John Ashmore Smith for their lives as tenants in common, and after their decease to the use and behoof of the first son of the body of the said William Smith and of the body of the said John Ashmore Smith lawfully to be begotten, and the heirs male of his body of such first son lawfully issuing, and for default of such issue then to the said second, third, fourth, fifth, and every other son and sons of the body of the said William Smith and of the said John Ashmore Smith in remainder one after another, &c. But in case either of his said grandsons William Smith or John Ashmore Smith should depart this life without leaving such lawful issue of his body, then he (testator) devised all the part or share of his said real estate, hereditaments, and premises intended for him unto the survivor of them. And in case both his said grandsons should depart this life without leaving such lawful issue as aforesaid, then he (testator) devised all the said hereditaments unto his three granddaughters Elizabeth Murcott, Ann Murcott, and Caroline Dorothy Ashmore Murcott, and to the heirs of their respective bodies lawfully issuing, to take as tenants in common. But in case either or any of his said granddaughters should depart this life without leaving lawful issue of her or their body or bodies, then he (testator) gave the part or share intended for her or them so dying unto the survivors or survivor of them, and to the heirs of her body lawfully issuing. And in case all his said three granddaughters should depart this life without leaving lawful issue as aforesaid, leaving their said father and mother, or either of them, her surviving, then he (testator) gave and devised the said real estate and premises unto William Murcott and Ann his wife, and to the survivor of them, for and during the terms of their respective natural lives and the life of the longer liver of them. And from and after their several deceases, and the decease of the

1876

LEADBEATER v. CROSS.

survivor of them, he gave and devised the said real estate and premises unto Thomas Murcott (brother of the said William Murcott) and to John Ashmore (son of his (testator's) nephew Thomas Ashmore) and to Thomas Gilbert, the younger, and to their respective heirs and assigns for ever, to take as tenants in common, and not as joint tenants.

The said William Smith and John Ashmore Smith survived the testator, and upon his death entered into possession of and took the rents and profits of the farm.

The said William Smith died on the 12th of March, 1837, having had lawful issue a son (still-born) in the lifetime of the said William Smith, and a daughter, the defendant, Sophia Pridmore.

The said John Ashmore Smith, after the death of the said William Smith, entered into the possession of and took the rents and profits of the whole of the farm, and died unmarried on the 4th of April, 1874.

Elizabeth Murcott died on the 25th of November, 1821, unmarried, and Ann Murcott died unmarried on the 24th of November, 1823.

Ann Murcott, the mother of the above Elizabeth and Ann, died on the 5th of May, 1821, and William Murcott, the father of the same, died on the 21st of May, 1827.

Caroline Dorothy Ashmore Murcott married one George Townsend, by whom she had issue one child only, George Henry Townsend. She died on the 8th of June, 1851, and the said George Henry died unmarried some time in the year 1870.

John Ashmore died intestate in May, 1869, and his eldest son and heir, Thomas Charles Ashmore, by deed dated the 8th of January, 1872, sold and conveyed his residuary interest in one-third of the said farm to the plaintiff.

The defendant Joseph Cross was let into possession of the said farm by the said John Ashmore Smith, and the other defendants allege that the said Joseph Cross has, since the death of the said John Ashmore Smith, become their tenant of the same.

The plaintiff seeks to recover possession of one undivided third part of the farm, and also mesne profits.

Defence. That defendant G. A. Pridmore, in right of his wife

Sophia Pridmore, was in possession by the defendant J. Cross, his tenant, of the land claimed by the plaintiff.

Reply. Joining issue.

By a judge's order under Order XXXIV., Rule 2, the questions of law as to the construction of the will, as far as relevant, on the facts stated on the pleadings, were set down for argument as if they were stated in a special case.

Nov. 14. *A. Wills, Q.C.* (*Willis* with him), for the plaintiff. The tenancy for life in William Murcott and his wife was not intended to operate as a contingent remainder, but was a devise immediately vested. The ulterior limitations were therefore not destroyed by the death of the tenants for life in the lifetime of the granddaughters: Jarman on Wills, 3rd. ed. vol. i. p. 764.

Joshua Williams, Q.C. (*J. E. Woodroffe* with him), for the defendants. It was the intention of the will to create a contingent remainder in William Murcott and his wife, and this remainder failing by their death during the lifetime of the tenants in tail, the ulterior limitations failed also. [He cited Jarman on Wills, 3rd ed. vol. i., p. 788; Fearne on Contingent Remainders, 10th ed. vol. i., p. 236; *Doe* v. *Shipphard* (1); *Maddison* v. *Chapman* (2); *Egerton* v. *Massey* (3); *Gray* v. *Golding* (4); *Cattley* v. *Vincent.* (5)]

Cur. adv. vult.

Nov. 21. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.) was delivered by

LUSH, J., who, after reading the facts from the statement of claim, proceeded—The contention on the part of the defendants was that the devise of the estate for life to William Murcott and his wife was a contingent remainder, and that as that estate failed by their death in the lifetime of the tenants in tail, the ulterior limitations, being made dependent on the same contingency, failed also, and consequently the reversion passed to the heir-at-law of the testator as upon an intestacy. No doubt the life

(1) 1 Doug. 75.

(2) 4 K. & J. 709; 28 L. J. (Ch.) 450.

(3) 3 C. B. (N.S.) 338; 27 L. J. (C.P.) 10.

(4) 6 Jur. (N.S.) 474.

(5) 15 Beav. 198.

1876

LEADBEATER v. CROSS.

estate in question is limited in terms of contingency; terms which, literally construed, make the happening of the event, namely, the survivorship of the tenants for life, a condition precedent to the gift. But we are to look not at the form, but the substance of the devise, and we are of opinion that the testator intended the ultimate devisees to take, whether William Murcott and his wife outlived their daughters and their issue or not, and that there is nothing in the language he has used which obliges us to hold that that intention cannot be carried into effect.

One of the rules of construction laid down in Powell on Devises (3rd. ed. by Jarman, vol. ii. p. 217) is, "where an estate in remainder is limited in terms of contingency on the happening of certain events, and the events described are precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be not a contingent gift conditioned to take effect on these events, but a devise immediately vested, the possession of which is necessarily dependent on the events in in question."

This rule, which is deduced by the learned author from the cases which he quotes, could not have been more accurately framed to meet this case, if it had been framed for the purpose, and it is one which commends itself to common sense. The testator gives an estate for life to the father and mother of his granddaughters if they should survive the granddaughters and their issue, to whom he had previously given an estate tail. The event described as the one on the happening of which the gift is to take effect, is precisely that on which they are to enter into possession. The gift being of a life estate only, what is expressed as a contingency is only that which would be necessarily implied if the devise were in the most absolute form. To hold that the ultimate remainder failed because the tenants for life did not outlive the estate tail, and therefore did not enter into possession of their life estate, would, as it appears to us, defeat the plain intent of the testator.

It is unnecessary to comment on the authorities cited by the learned author in support of his proposition. Cases of this description are only useful as affording so many illustrations of the principle, and as guides to its application. Variations of

1876

LEADBEATER v. CROSS.

expression are not to be regarded as substantial distinctions, and where the intention of the will is plain, and no rigid rule of law prevents effect being given to it, our duty is so to construe it as to carry out that intent.

We are therefore of opinion that the estate for life was a vested and not a contingent interest, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Rogerson & Ford.*
Solicitors for defendants: *Robinson & Preston.*

[IN THE COURT OF APPEAL.]

Nov. 13.

TURNER *v.* SAMSON AND OTHERS.

Accommodation Bill—Notice of Dishonour.

Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonour.

ACTION by C. Turner against M. Samson, M. Crichton, W. Horne, and F. Martinez. The plaintiff claimed 250*l.* and interest due to him as the holder of a bill of exchange for 250*l.* at four months drawn by Horne on, and accepted by, Samson, and indorsed by Horne, Martinez, and R. Sherwood.

The defendant Martinez by his statement of defence pleaded to the effect that the bill as between all the parties was an accommodation bill, drawn, accepted, and indorsed, for the purpose of enabling Sherwood to raise money on it; that Sherwood had promised to meet the bill, but had failed to do so; and that the defendant Martinez had not received at any time any notice of the dishonour of the bill.

Demurrer. On the ground that, as it appeared by the statement of defence that the bill of exchange was an accommodation bill between all the parties, none of them were entitled to notice of dishonour.

On the demurrer coming on for argument before the Queen's

1876

TURNER v. SAMSON.

Bench Division, the defendant did not appear, and judgment was entered for the plaintiff.

The defendant Martinez appealed.

Cooper Wyld (with him *E. C. Willis*), for the defendant. Martinez, as indorser, is entitled to notice of dishonour, and the fact that it is an accommodation bill is no excuse: Chitty on Bills, p. 305, 10th ed.

Philbrick, Q.C., and *Petheram*, for the plaintiff. The acceptor of a bill is not entitled to notice: the drawer is; but if the bill is an accommodation bill, the drawer is not entitled to notice, as he has no right to expect the acceptor to meet the bill; and all parties to an accommodation bill are in the position of drawers. The reason for requiring notice is that the drawer may have effects in the hands of the acceptor which he may wish to withdraw, also that he may have a remedy over: *Bickerdike* v. *Bollman*. (1) But these reasons do not apply to an accommodation bill. None of the parties had any right to expect that any one but Sherwood would meet the bill, and he was not the acceptor. In *Carter* v. *Flower* (2), if there had been a sufficient allegation of no consideration, the demurrer would have been overruled.

MELLISH, L.J. The question in this case is whether there was a valid excuse for not giving notice of dishonour of a bill. It appears beyond doubt that the bill was an accommodation bill, and that the drawer and the other defendants as indorsers all signed the bill for the accommodation of Sherwood. The question is in substance whether the defendant, the appellant, was entitled to notice. He was plainly not the person who was to take up the bill, and he had a right to suppose that another person would see that it was taken up. It appears to me that the defendant was in the same position as if the acceptor had been the person who was ultimately liable to pay.

BRETT, J.A. This is an action against an indorser of a bill of exchange, and it is stated that no notice of dishonour was given to the defendant. Under such circumstances an action cannot be

(1) 1 T. R. 405; 2 Sm. L. C. 7th ed. 50. (2) 16 M. & W. 743.

maintained, unless there is a sufficient excuse for not giving the notice, and the question is whether there is here a sufficient excuse. I think not, because it is not shewn that the defendant is an indorser who, if made to pay, would have no remedy against the acceptor or any other person. I take the rule to be that an indorser cannot be sued without notice of dishonour, unless it is shewn that, if made liable, he would have no remedy against any other person: *Bickerdike* v. *Bollman* (1) was held to be within the rule, and *Carter* v. *Flower* (2) was held not within the rule. In one case the excuse was sufficient, in the other it was not. In *Esdaile* v. *Sowerby* (3), Lord Ellenborough said that knowledge was not to be considered equivalent to notice; and in *Carter* v. *Flower* (4) Parke, B., says that the Court ought not to go beyond the decided cases.

AMPHLETT, J.A. I am of the same opinion. Looking at the facts most favourably to the plaintiff, Sherwood was the principal debtor, and the others were all in the position of sureties for the payment of the debt. On another view of the case it might be held upon the form of the bill that the acceptor was primarily liable; but I think upon the whole the others must be taken to be co-sureties for Sherwood. Then what had Martinez a right to conclude would be done? It was the duty of Sherwood to provide funds to meet the bill when it became due; and the holder accordingly applied to Sherwood. The bill was dishonoured, and it was important for Martinez to know that the bill had been dishonoured, because then he had a right to sue Sherwood and the other parties for contribution. I think, therefore, that this does not bring Martinez under the rule which says that, if the drawer is primarily liable to pay, then notice need not be given.

Judgment for the defendant. (5)

Solicitor for plaintiff: *G. E. Philbrick.*

Solicitors for defendant: *Smith & Howard.*

(1) 1 T. R. 405; 2 Sm. L. C. 7th ed. 50.

(2) 16 M. & W. 743.

(3) 11 East, at p. 117.

(4) 16 M. & W. at p. 748.

(5) See *Foster* v. *Parker*, 2 C. P. D. 18.

1876
Nov. 21.

[IN THE COURT OF APPEAL.]

SHARP *v.* DAWES.

Company—Meeting—One Shareholder—Stannaries Act (32 & 33 *Vict. c.* 19), *s.* 4.

A single shareholder cannot constitute a meeting of a company under the Stannaries Act, 1869, s. 4.

APPEAL from an order of the Queen's Bench Division making absolute an order to increase the amount of a verdict for the plaintiff.

At the trial it appeared that the Great Caradon Mine was a mining company in Cornwall carrying on business on the cost-book system. The company had offices in London, and on the 22nd of December, 1874, a notice was duly given that a general quarterly meeting of the shareholders would be held on the 30th of December at the London offices for the purpose of passing the accounts, making a call, receiving a report from the agent, and transacting any ordinary business of the company.

The only persons who attended at the time appointed for the meeting were the secretary G. Sharp and one shareholder, R. H. Silversides, who held twenty-five shares. A circular was then sent to the shareholders with the accounts and the following notice:—

At a general meeting of the shareholders, held at 2, Gresham Buildings, Basinghall Street, London, E.C., on Wednesday, the 30th day of December, 1874, pursuant to notice,

R. H. Silversides, Esq., in the chair,

The notice convening the meeting having been read,

The minutes of the last meeting were confirmed.

The financial statement, ending the 28th of November, shewing a balance of 83*l.* 11*s.* 5*d.* against the shareholders, having been read, it was

Resolved—"That the same be received and passed."

Captain William Taylor's report having been read, it was

Resolved—"That the same be received and passed, and, together with the financial statement, be printed and circulated among the shareholders."

Resolved—"That a call of 4*s.* 6*d.* per share be now and is hereby made payable to the secretary, and that a discount of 5 per cent. be allowed if paid by the 20th of January, 1875."

Resolved—"In consequence of the death of Lieut.-Col. W. T. Nicolls, and

until the appointment of a shareholder to act in his stead, that all cheques be signed by Mr. R. H. Silversides and Mr. Granville Sharp jointly."

(Signed) R. H. Silversides, Chairman.

Resolved—"That a vote of thanks be given to the chairman."

(Signed) Granville Sharp, Secretary.

There was no rule of the company varying the requirements of the Stannaries Act (32 & 33 Vict. c. 19). By rule 4,—

The secretary shall call a general meeting of the shareholders once in every three calendar months, to be held at such time and place as shall be appointed by the committee of management.

The defendant, one of the shareholders, refused to pay this call, and the action was brought against him, in the name of the secretary, for the amounts due on a previous call and on this call.

Judgment was given for the plaintiff for the amount due on the previous call, with leave to move to increase it by the amount due on the second call.

The plaintiff accordingly moved before Blackburn and Quain, JJ., who made the rule absolute.

Holl, for the defendant. The call is invalid; one shareholder cannot constitute a meeting and make a call under the powers of the Stannaries Act, 1869 (32 & 33 Vict. c. 19) (1) and the rules of this company. It was clearly the intention of the legislature that there should be a discussion. In no sense of the word can

(1) 32 & 33 Vict. c. 19, s. 4: "Meetings and proceedings generally. Except as otherwise provided by this Act, or by the rules or regulations of any company, a resolution passed at a meeting of the company, by the votes of a majority in value of such of the shareholders as are present in person or represented by proxy, at the meeting, shall be deemed the resolution of the meeting, and shall be binding on all the shareholders in the company, whether present or absent; but nothing in this clause shall authorize any ordinary meeting to transact any business which an ordinary meeting could not transact at the time of the passing of this Act, except as is hereinafter provided."

Sect. 5: "Where anything to be done by a company is by this Act required to be done at a meeting with special notice, it shall not be valid if done otherwise than at a meeting, notice whereof is served on the several shareholders not less than seven clear days before the day of the meeting, specifying the place, day, and hour of meeting, and the business to be transacted thereat, or so much thereof as is required to be done with special notice."

Sect. 10: "At any meeting of a company with special notice, the accounts of the company may be audited, and a call may be made."

1876

SHARP v. DAWES.

one person constitute a meeting; the use of the word shareholders, in the plural, shews this. In fact the meeting was abortive, as it would have been if no shareholder had attended. Another meeting ought to have been called. Neither the words nor the spirit of the Act have been complied with.

J. Brown, Q.C., and *Lane*, for the plaintiff. There is nothing in the Act or in the rules to shew that there must be several persons present. This is a regular quarterly meeting, compulsorily held under rule 4 of the rules and regulations of the company. And by rule 6, the shareholders are to examine the accounts and vote funds. By s. 4 of the statute the majority is not to be in number of shareholders but in value of the shares. The shareholder present had 25 shares, and suppose one other shareholder with one vote had attended, then the call would unquestionably have been good. Or suppose several others with 20 shares between them had been there. They would have been outvoted by this one shareholder, and their presence would have been useless. Suppose a company of 100 shares, of which one shareholder held 55. He could clearly vote what he pleased, and why should the other shareholders attend? Yet the company might and ought to go on. The other shareholders had been summoned, and if they did not choose to attend, the one who did had a right to vote. The word meeting has here a technical meaning, and indicates the way in which the business of the company is to be carried on. In a private partnership if one partner only attends, his acts bind the others. No quorum is prescribed by the Act, and why should the other shareholders attend if they are satisfied? As to the plural words, they in an Act of Parliament now include the singular. It would be a strange thing to hold, that if there had been an opposition the call could be made, but as there was none, it could not.

LORD COLERIDGE, C.J. This is an attempt to enforce against the defendant a call purporting to have been made under s. 10 of the Stannaries Act, 1869. Of course it cannot be enforced unless it was duly made within the Act. Now, the Act says that a call may be made at a meeting of a company with special notice, and

we must ascertain what within the meaning of the Act is a meeting, and whether one person alone can constitute such a meeting. It is said that the requirements of the Act are satisfied by a single shareholder going to the place appointed and professing to pass resolutions. The 6th and 7th sections of the Act shew conclusively that there must be more than one person present; and the word "meeting" primâ facie means a coming together of more than one person. It is, of course, possible to shew that the word "meeting" has a meaning different from the ordinary meaning, but there is nothing here to shew this to be the case. It appears therefore to me that this call was not made at a meeting of the company within the meaning of the Act. The order of the Court below must be reversed.

MELLISH, L.J. In this case, no doubt, a meeting was duly summoned, but only one shareholder attended. It is clear that, according to the ordinary use of the English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholder at all had attended. No business could be done at such a meeting, and the call is invalid.

BRETT and AMPHLETT, JJ.A., concurred.

Judgment for the defendant.

Solicitor for plaintiff: *A. E. Copp.*
Solicitor for defendant: *F. W. Snell.*

1876
Nov. 4.

[IN THE COURT OF APPEAL.]

THE QUEEN, ON THE RELATION OF R. J. ANDREWS, *v* COLLINS.

Local Board of Health—Election of Members—Counting of Votes—Decision of Chairman when Conclusive—11 & 12 *Vict. c.* 63, *s.* 27; 35 & 36 *Vict. c.* 55, *sch. II., ss.* 51–54.

Post 43, 4 & 7

After the election of a local board, under 11 & 12 Vict. c. 63, the chairman proceeded, under s. 27, to ascertain the number of valid votes for each candidate, and to cast up the votes; and he made his certificate as to who were the candidates elected. On the trial of a quo warranto information against one of the successful candidates, it appeared that the chairman had, by mistake (1.), put down votes to one candidate which the voting papers shewed had been given for another; (2.) had omitted to reckon votes; and also (3.) had received as valid votes which were invalid, but as to which he had made no examination:—

Held, affirming the decision of the Queen's Bench Division, that as to the first and second class of votes, the duty of the chairman was merely ministerial, viz., that of casting up the votes, and as to this his certificate could be impeached; but that as to the third class he had to exercise a judicial duty, and as to this therefore his certificate was conclusive.

APPEAL from the decision of the Queen's Bench Division making absolute a rule to enter a verdict for the Crown. (1)

This was a quo warranto, calling on the defendant to shew by what title he acted as a member of a local board of health. The cause was tried before Blackburn, J., without a jury.

The case was argued on appeal on the facts as stated in the judgment of Blackburn, J., of which the following are the material parts:—It appeared that at the election in question there were seven vacancies and nine candidates. The voting papers were duly collected and received, and the chairman proceeded on the proper day to ascertain the number of valid votes for each candidate, under 11 & 12 Vict. c. 63, s. 27. (2) The chairman certified that

(1) 1 Q. B. D. 336.

(2) 11 & 12 Vict. c. 63, s. 27: The chairman shall, on the day immediately following the day of the election, and on as many days immediately succeeding as may be necessary, attend at the office of the local board of health, and ascertain the validity of the votes by an examination of the rate-books and such other books and documents as he may think necessary, and by examining such persons as he may see fit; and he shall cast up such of the votes as he shall find to be valid, and to have been duly given, collected, or received, and ascertain the number of

six others (whose election was not disputed) and Collins were duly elected. He made out a list containing the names of the candidates and the number of votes given for each, and the names of the persons elected, which he signed and certified, and delivered it, along with the voting and nomination papers, to the local board, who deposited this list, together with the voting papers, for public inspection, as required by the section. The chairman not merely put down the number of votes for each candidate, but also made out and kept a list, by reference to the numbers on the voting papers, of the voters whom he had reckoned as voting for each candidate, so that there was no difficulty, in fact, in ascertaining how he made out the majority. According to this list the six persons whose election was not disputed had most votes. Collins had 382 votes, and Andrews 379 votes. If the certificate was conclusive, Collins was entitled to the verdict. Subject to objection on both sides, evidence was received of three classes of mistakes.

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such votes for each candidate; [* * *] and the candidates, to the number to be elected, who, being duly qualified, shall have obtained the greatest number of votes shall be deemed to be elected, and shall be certified as such by the said chairman under his hand; and to each person so elected the said chairman shall send or deliver notice of such election; and the said chairman shall also cause to be made a list containing the names of the candidates, together with (in cases of a contest) the number of votes given for each, and the names of the persons elected, and shall sign and certify the same, and shall deliver such list, together with the nomination and voting papers which he shall have received, to the local board of health at their first or next meeting (as the case may be), who shall cause the same to be deposited in their office, and the same shall, during office hours thereat, be kept open to public inspection, together with all other documents relating to the election, for six months after the election shall have taken place, without fee or reward; and the said chairman shall cause such list to be printed, and copies thereof to be affixed at the usual places for affixing notices of parochial business within the parts for which the election shall have been made.

The whole of this statute is repealed by 38 & 39 Vict. c. 55; but the enactments of s. 27 as to the duties of the chairman or returning officer are re-enacted in the new Act in sch. II., ss. 51–54, in precisely the same terms, with the insertion of the following clause at the [* * *]:—

"Any candidate may himself attend or may appoint any agent to attend the examination and casting up of the votes; any candidate or agent so attending who obstructs or in any way interferes with the examination and casting up of the votes may, by order of the returning officer, be forthwith removed from the place appointed for that purpose, and shall not be permitted to return."

1876

THE QUEEN v. COLLINS.

First, it was proved that votes, which by the voting papers appeared not to have been given for Collins, had been, as appeared by the list, by mistake put down for him, and that votes which, as it appeared by the voting papers, had been given for Andrews, had, as it appeared by the list, not been put down for him but for some one else; and similar blunders were shewn to have been made with respect to Andrews. On the balance of these mistakes Andrews had three in his favour, making an equality of votes between him and Collins. A second kind of mistake was then shewn, that one voting paper had been mislaid and was not reckoned at all. It was found next day in the room, and turned out to be a vote in favour of Andrews. This, if it could be reckoned, put Andrews in a majority of one over Collins. The defendant then gave evidence of a third kind of mistake: that one of the voting papers received, and, as it appeared by the list, reckoned for Andrews, was a vote by a person who could not write, and was wholly written and signed in his name by another person, and the vote was, therefore, bad under s. 25. Another vote, which also was reckoned for Andrews, was that of a person who had not been rated, nor paid rates, and this vote was bad under s. 20. The chairman had not had his attention called to either of these two last votes, and did not examine any person as to the genuineness of the signature in the first case, or the rate-books as to the last, nor did he, in point of fact, come to any conclusion as to the validity of these votes before receiving them. If evidence of this kind of mistake was admissible, Collins was again in a majority over Andrews.

The counsel for the defendant contended that the certificate of the chairman was conclusive, and that no evidence of any mistake on his part was admissible; but that, if evidence of any one kind of mistake could be given, all three sorts might be shewn.

The counsel for the relator contended that the certificate might be impeached by shewing any errors in the mechanical process of reckoning and casting up the votes, but that no error could be shewn in receiving votes as valid as to which he might have made a judicial, or at least quasi judicial, investigation, though an ex parte one.

The learned judge directed a verdict for the defendant, with leave to move to enter it for the Crown.

A rule was obtained accordingly, and was afterwards made absolute, the Court being of opinion that the certificate might be impeached as to the first and second class of mistakes, but Mellor and Field, JJ., being of opinion that as to the third class the certificate was conclusive, Blackburn, J., dissenting as to this. (1)

H. T. Cole, Q.C., for the defendant. The reasons given by Blackburn, J., in the court below are strong to shew that the legislature did not intend to make the decision of the chairman conclusive. In addition to the cases in the court below, *Reg.* v. *Morgan* (2) should be cited, in which a quo warranto was granted, on the ground that the chairman had wrongly decided that a nomination paper was invalid under s. 24, and had not returned a successful candidate nominated by it.

[MELLISH, L.J. There is no judicial duty imposed on the chairman by s. 24. He is not required to inquire into the validity of the nomination paper, as he is into the validity of the votes, by s. 27. If the requirements of the section are not complied with, the nomination will be void.

AMPHLETT, J.A. Can there be a judicial act by an officer when there is no one before him?

BRETT, J.A. The chairman is to arrive at a conclusion as to the validity of the votes after an inquiry: that is quasi judicial, at all events.]

The duties may be quasi judicial, but that is not sufficient to make his decision final and conclusive. The question is, as Blackburn, J., points out, whether the terms of s. 27 are such as to lead to the conclusion that the legislature meant his decision to be final. The examination by the chairman is surely only a preliminary; and if there can never be a scrutiny, what is the use of the voting papers being kept for six months?

Kingdon, Q.C., for the relator, was not heard.

LORD COLERIDGE, C.J. We are asked to review the decision of the majority of the judges in the Queen's Bench Division, and to follow the opinion of Blackburn, J. The Court below seem to have been agreed, and indeed no one can well dispute, that, with

(1) See 1 Q. B. D. 336. (2) Law Rep. 7 Q. B. 26.

1876

THE QUEEN v. COLLINS.

regard to the miscasting of the votes by the chairman, his duty in this respect is plainly ministerial, and consequently so far his certificate is not conclusive, and there may be an inquiry as to that. But the majority of the judges were of opinion that, with regard to votes as to the validity of which the chairman arrived at a decision by inquiry, or might have held such inquiry, the certificate is conclusive. I am of opinion that that view is correct. The statute 11 & 12 Vict. c. 63, s. 27, enacts:—[The Lord Chief Justice read the chief parts of the section.] The chairman is to ascertain the validity of the votes by such means as the statute points out; other means might possibly have been more satisfactory, but the legislature has defined the means, viz., by examination of the rate-books and other documents, and by examining such witnesses as he thinks fit. I apprehend that this is clearly a judicial proceeding. As Brett, J.A., put it, the chairman is to arrive at a conclusion after an inquiry; and though the inquiry may, in this particular case, not have been gone into, that can make no difference. If the chairman neglects his duty, he is liable to a penalty of 50*l*. If he wilfully abstains from making an inquiry, and so arrives at an erroneous conclusion by reason of his wilful neglect, other considerations may arise; there is no suggestion of such malpractices here. Two votes have been cast up and allowed to one of the candidates, not by miscasting, but votes which, if the validity had been gone into, ought not to have been allowed. As to these votes, I think the certificate was conclusive. The Act has ordered the chairman to ascertain the validity of the votes, and to cast up the number of votes which he finds to be valid, and he is to certify the number of votes which each of the candidates has; the certificate, therefore, is not the result of casting up merely, but of the examination which the chairman is to make. It is, therefore, the result of judicial decision, and cannot be questioned in this form. That, I think, is the true construction of s. 27, and there would be extreme inconvenience if the decision of the chairman as to the validity of votes could be questioned in a quo warranto; the mere adding up is a different matter. This inconvenience is so obvious, that, as Mellish, L.J., pointed out, it has been removed in the case of municipal elections, and a special tribunal of appeal appointed. Nor is the case without authority;

we have the authority of Lord Campbell in *Reg.* v. *Cross* (1), a case at nisi prius, but of as high authority as a nisi prius case can possibly be. Blackburn, J., can hardly have had the facts of that case accurately before him. For this was the very point decided in the case. There were two questions: first, as to the proper appointment of chairman, which was decided in the affirmative; and then, secondly, whether the certificate of the chairman was conclusive. It is expressly stated that counsel for the relator proposed to go into a scrutiny, which was objected to by the defendant's counsel, and the point was argued, and Lord Campbell decided that the certificate was final and conclusive as to the validity of the votes received; though, he said, it might be otherwise as to the mere casting up. We have, therefore, not only the authority of the majority of the judges in the court below, but that of a judge of the greatest experience. I am therefore of opinion that the judgment of the Queen's Bench Division gives the true construction of s. 27, and that it should be affirmed.

MELLISH, L.J. I am of the same opinion. The legislature in this statute created a new body to be elected by popular suffrage, and if no mode were pointed out as to how the validity of the election was to be determined, then the Queen's Bench Division would be the proper tribunal by means of a quo warranto. But I am of opinion that the statute appoints a particular person as the tribunal to decide the validity of the votes, viz., the chairman; and the ordinary distinction holds good, that what is to be done by an officer ministerially may be questioned, but if he acts judicially, then his decision is binding and conclusive, unless an appeal is given. Now the words of s. 27 are amply sufficient to give to the decision of the chairman the nature of a judicial determination. It says the chairman shall ascertain the validity of the votes by examining the rate-books and witnesses; it does not go on to give him power to examine the witnesses on oath; but it is clear he is to arrive at a decision after a quasi judicial inquiry: "And he shall cast up such of the votes as he shall find to be valid." The casting up is ministerial, but the "finding" is judicial. Notwithstanding the imperfection of the tribunal, I am of opinion that the

(1) 19 L. T. 35.

1876

THE QUEEN v. COLLINS.

certificate is conclusive, and the legislature may well have thought the expense, delay, and inconvenience of further inquiry outweighed that objection. I think, therefore, the decision of Lord Campbell in *Reg.* v. *Cross* (1) was correct. This was a long time ago, and the legislature have not interfered. They have passed an Act altering the law as to municipal elections (2), and have also with regard to this very election of local boards (3) added a clause that any candidate or his agent may be present at the examination of the voting papers; but in no way altering the enactments as to the duties of the returning officer; leaving therefore that decision untouched. I am therefore of opinion, that the judgment of the Queen's Bench Division ought to be affirmed.

BRETT, J.A., concurred.

AMPHLETT, J.A. If this case were without previous authority, I should have had great difficulty in concurring in the judgment of the rest of the Court. I do not see how the decision can be said to be a judicial decision when the determination is arrived at without any inquiry and with no one before him, although the officer may have had the means of making an inquiry. But when I find that so long ago so high an authority as Lord Campbell had come to the same decision, and that this decision has been acquiesced in, and a new Act has been passed enabling an agent to be present, but not altering the law, and expressly enacting that the agent shall not interfere in the examination, I think that we ought to be bound by the decision in *Reg.* v. *Cross* (1), and I am therefore not prepared to differ or express any dissent from the judgment of the Court.

Judgment affirmed.

Solicitor for relator: *McArthur.*

Solicitors for defendant: *Combe & Wainwright.*

(1) 19 L. T. 35.

(2) See 35 & 36 Vict. c. 60, ss. 12, et seqq.

(3) See 38 & 39 Vict. c. 55, sch. II. ss. 51–54.

[IN THE COURT OF APPEAL.]

1876
Nov. 7.

THE QUEEN, ON THE PROSECUTION OF HARGRAVES AND OTHERS, *v.* STEEL AND OTHERS.

Appeal in Criminal Cases—Judicature Acts, 1873 *and* 1875, 36 & 37 *Vict. c.* 66, *ss.* 19, 47; 38 & 39 *Vict. c.* 77, *s.* 19—*Costs in Information for Libel under* 6 & 7 *Vict. c.* 96, *s.* 8.

Under the Judicature Acts, 1873 and 1875, there is no appeal to the Court of Appeal in a criminal case except for error on the record.

By 6 & 7 Vict. c. 96, s. 8, on judgment for the defendant in an information for libel he is entitled to recover from the prosecutor his costs, to be taxed by the officer of the Court before which the information is tried. The master of the Crown office having taxed the defendant his costs according to the usual practice under a side-bar rule, the defendant appealed to the Queen's Bench Division against the taxation, and that Division affirmed the taxation. On appeal to the Court of Appeal:—

Held, that by the latter part of s. 47 of 36 & 37 Vict. c. 66, the general right of appeal given by s. 19 from any judgment of the High Court is excepted in any criminal cause or matter; that the costs were the consequence of the judgment, and were within the exception; and that the Court of Appeal had no jurisdiction.

2 Ch D 335.
46 L J Ch 35
5 Q B D 468
7 Q B D 578
10 Q B D 379

ON the trial of an information for libel the defendants had a verdict, and judgment having been entered for them, the master of the Crown office taxed the defendants' costs pursuant to 6 & 7 Vict. c. 96, s. 8 (1), under a side-bar rule, according to the usual practice. A rule was obtained to review this transaction, which rule the Queen's Bench Division afterwards discharged. (2)

The prosecutors appealed to the Court of Appeal.

C. Russell, Q.C., and *Crompton*, for the defendants, took objection to the jurisdiction of the Court. No doubt by the Judicature Act, 1873 (35 & 36 Vict. c. 66), s. 19 (3), the Court of Appeal has

Post 43
44-47.

(1) 6 & 7 Vict. c. 96, s. 8: "In case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information . . . such costs to be taxed by the proper officer of the Court before which the said indictment or information is tried."

(2) 1 Q. B. D. 482.

(3) 36 & 37 Vict. c. 16, s. 19: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, sub-

1876

THE QUEEN v. STEEL.

jurisdiction to hear and determine appeals from any judgment or order of the High Court; but that is "save as hereinafter mentioned." By s. 45, the decision of the Divisional Court of Appeal is to be final unless leave to appeal is given. By the latter part of s. 47, after enacting as to the High Court sitting to hear Crown Cases Reserved, there is a general enactment that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent on the record."

[BRETT, J.A. Is not that section confined exclusively to the "said High Court," that is, the High Court constituted to hear Crown Cases Reserved?

LORD COLERIDGE, C.J. That construction would make the last clause surplusage, as the clause immediately preceding says

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ject to the provisions of this Act, and to such rules or orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act."

By s. 47: "The jurisdiction and authorities in relation to questions of law arising in criminal trials, which are now vested in the justices of either Bench and the Barons of the Exchequer by the Act of 11 & 12 Vict. c. 78, intituled 'An Act for the further Amendment of the Administration of the Criminal Law,' or any Act amending the same, shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of 11 & 12 Vict."

By 38 & 89 Vict. c. 77, s. 19 (in the same terms as s. 71 repealed, of 36 & 37 Vict. c. 66): "Subject to the first schedule hereto and any rules of Court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act."

Order XLII. "Exceptions from the Rules: Nothing in these rules shall affect the practice or procedure in any of the following causes or matters:—Criminal Proceedings: Proceedings on the Crown side of the Queen's Bench Division: Proceedings on the Revenue side of the Exchequer Division: Proceedings for Divorce or other Matrimonial Causes."

that "the determination by the judges of the said High Court in manner aforesaid," that is, as a Court for Crown Cases Reserved, "shall be final and *without appeal*."]

The latter part of s. 47 is general; and this is further shewn by s. 71, which is repealed and re-enacted, without any material alteration, by s. 19 of 38 & 39 Vict. c. 77: "Subject to the first schedule hereto, and any rules of Court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as before the Act." By Order LXII. nothing in the rules is to affect the practice or procedure in criminal proceedings.

Aspinall, Q.C., and *Sutton*, for the prosecutors. Sect. 19 of the Act of 1873 gives the Court of Appeal jurisdiction to hear appeals from any judgment *or order* of the High Court, "save as hereinafter mentioned;" s. 47 is confined to the Court for Crown Cases Reserved.

[BRETT, J.A. Has the High Court jurisdiction in criminal cases besides the jurisdiction given it by s. 47?

C. Russell, Q.C. The commissioners for exercising criminal jurisdiction on circuit are constituted a Court of the High Court by s. 29.

LORD COLERIDGE, C.J. By s. 16 there is transferred to and vested in the High Court the jurisdiction hitherto exercised by any of the following Courts . . . . "(11) The Courts created by commissions of assize, of oyer and terminer, and of gaol delivery, or any of such commissions."

BRETT, J.A. That goes to shew that the latter part of s. 47 is general and applies to the High Court when exercising this jurisdiction, and is not, as counsel for the prosecutors is desirous to make out, mere repetition of the same thing twice over.]

Secondly, assuming this clause of s. 47 to be general in its application, this is not a judgment in a criminal matter. An information for a libel may be a criminal proceeding, but these costs are no part of the judgment, it is a mere collateral matter. The prosecutor is no party on the record; as far as the costs are concerned, which are all that the appeal touches, it is a quasi civil matter between the prosecutor and the defendant.

1876

THE QUEEN v. STEEL.

[*C. Russell, Q.C.*, referred to *Richardson* v. *Willis*. (1)]

That case directly confirms the prosecutors' contention, it was there held that the costs might be enforced by action.

LORD COLERIDGE, C.J. I am of opinion that we have no jurisdiction to entertain this appeal. It appears to me that s. 47 of the Act of 1873, as explained by s. 19 of the Act of 1875, takes away the general right of appeal given by s. 19 of the Act of 1873. Sect. 47 no doubt is confined in the first part to the Court for Crown Cases Reserved; and also when it says: "The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal;" but then the section goes on: "and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelve years of Her Majesty's reign." This clause is not confined to the said High Court sitting to hear points reserved, but applies to the High Court in the exercise, amongst others, of the jurisdiction given to it in criminal cases under s. 16, subs. 11; and the saving clause was necessary in order to preserve an appeal for error on the record; the general intention of the section being not to take away any right of appeal which already existed, but, on the other hand, not to give any new right of appeal. But then it is said that this is not the case of a judgment in a criminal cause or matter, because the costs are not given by the judgment, being taxed under an order of court, or side-bar rule as it is called, upon judgment being signed. But s. 19 of the Act of 1875 shews that it was intended that the practice and procedure in all criminal causes and matters whatsoever should be the same as before the Act. Now is this a procedure in a criminal cause or matter? I think it cannot be doubted that a criminal information is a criminal cause or matter; it only differs in mere form from an indictment; instead of the jurors presenting a bill the Queen's coroner prefers the information, but to all intents and purposes the one is as much a criminal matter as the other. By 6 & 7 Vict. c. 96, s. 8, certain consequences are attached to

(1) Law Rep. 8 Ex. 69.

1876

THE QUEEN v. STEEL.

the judgment for the defendant in a criminal information by a private prosecutor for libel, viz. that the defendant, if judgment is given for him, is entitled to his costs from the prosecutor, and this order of the Court to tax is a matter of course after judgment, and it is clearly part of the procedure in a criminal matter. which is without appeal.

MELLISH, L.J. I am of the same opinion. By s. 19 of the Act of 1873 the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court of Justice. These are the general words on which the appellants rely as giving them the right of appeal in the present case. But it is "save as hereinafter mentioned," and the respondents rely on s. 47 as excepting all criminal matters, whereas the appellants say s. 47 only applies to the Court for Crown Cases Reserved. I am of opinion that the section has the effect the respondents contend for, and that it does more than take away an appeal from the judgment of the High Court when sitting as a Court for Crown Cases Reserved. No doubt the first part of the section refers to the Court for Crown Cases Reserved, and it enacts that no appeal shall lie from the determination of the judges of the said High Court in manner aforesaid, that is, sitting as a Court for Crown Cases Reserved; but it goes on and says that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter." Are you to confine this to the Court for Crown Cases Reserved, or is it general, extending the exception or exemption from appeal to all criminal causes or matters? I am clearly of opinion that it is general; and then the saving clause was necessary to retain the former right of appeal for error on the record. If this were not so there would be an appeal from the Court of Queen's Bench, not only on every judgment, but on any order in a criminal case. The intention of the latter part of s. 47 was to prevent this; and there appears no reason, but the contrary, why the words "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter" should be confined, as the appellants contend, to the High Court when sitting as a Court for Crown Cases Reserved. On this view I should hold, if there were no other section besides the 47th, that it was intended

1876

THE QUEEN v. STEEL.

to leave an appeal in criminal cases as it was before, only for error on the record. If there were any doubt on s. 47, this view is strengthened by s. 19 of the Act of 1875, and Order LXII.

BRETT, J.A. I am of the same opinion. It is admitted that there was previously no appeal in such a case as the present; but it is argued that an appeal is given by the Act of 1873. Now s. 19 of that Act primâ facie gives an appeal from all judgments or orders of the High Court, and I had doubts at one time whether s. 47 had the wide application contended for by the respondents, but all my difficulty is now removed. Mr. Aspinall was unable to give any force to the latter part of s. 47 in his construction of the section, and was obliged to treat part of it as mere tautology. I now agree, that although in the earlier part s. 47 is confined to the Court for Crown Cases Reserved, yet still at the end it deals with other criminal jurisdiction. The words are quite general. "No appeal shall lie from any judgment of the said High Court in any criminal cause or matter." Is this a judgment? "Judgment" by s. 100 includes "decree;" it does not in terms include "order." Costs are given by 6 & 7 Vict. c. 96, s. 8, to a defendant in a criminal information for libel on his obtaining judgment; they are, therefore, the inevitable consequence of the judgment, although not actually part of the judgment. That it was intended to leave the procedure in a criminal cause or matter untouched is shewn by s. 19 of the Act of 1875.

AMPHLETT, J.A., concurred.

Russell, Q.C., applied for costs.

LORD COLERIDGE, C.J. The House of Lords has held that a Court has power to give costs, although without jurisdiction for any other purpose; but we do not think it is a case for costs.

Appeal dismissed without costs. (1)

Solicitors for prosecutors: *James, Curtis, & James.*
Solicitors for defendants: *Carter & Bell.*

(1) See the next case.

[IN THE COURT OF APPEAL.]

1876
Nov. 24.

THE QUEEN *v.* FLETCHER.

Judicature Acts, 1873 & 1875, 36 & 37 *Vict. c.* 66, *ss.* 19, 47; 38 & 39 *Vict. c.* 77, *s.* 19, *Order LXII.*

A rule for a certiorari having been obtained in the Queen's Bench Division to bring up a summary conviction by justices, for the purpose of quashing it on the ground of want of jurisdiction, the Court discharged the rule. On appeal:—

Held, that the case was within the last clause of s. 47 of the Judicature Act, 1873, as a judgment of the High Court in a criminal matter, and that there was therefore no appeal.

26 Ex D 335.
336
5 QBD 446

APPEAL from the decision of the Queen's Bench Division discharging a rule for a certiorari, to bring up a conviction,—by Henry Fletcher, Esq., and others, justices of Cumberland, of Robert Birnie, under 1 & 2 Wm. 4, c. 32, s. 30, for trespass by day in pursuit of game, whereby Birnie was adjudged to pay 1*s.* penalty and costs, or be imprisoned for seven days,—for the purpose of quashing the conviction for want of jurisdiction, Birnie having, as it was alleged, set up a bonâ fide claim of right.

Foard, for the prosecutor, objected that the Court of Appeal had no jurisdiction, this being a criminal case, citing *Reg.* v. *Steel.* (1)

Bompas, for the defendant Birnie, contended that this was not a criminal proceeding in the High Court. It was a mere collateral proceeding in the nature of civil process, being part of the peculiar jurisdiction of the Queen's Bench Division in exercising control over justices. True, it was on the Crown side of the Queen's Bench Division, but there was nothing in the statutes to except cases on the Crown side (if not criminal cases) from the general enactment of s. 19 of the Act of 1873, which gave an appeal, save as thereinafter mentioned, from any judgment or order of the High Court. Mandamus and other writs were clearly in the nature of civil process; and this Court had lately heard an appeal in a quo warranto: *Reg* v. *Collins.* (2) It was true that Order LXII. said that nothing in the rules should affect the practice or procedure in criminal proceedings; but the rules could not

(1) Ante, p. 37, where the sections of the Acts are set out.

(2) Ante, p. 30.

1876

THE QUEEN v. FLETCHER.

control or take away the right of appeal given by the statute: *Reg.* v. *Sillem.* (1)

MELLISH, L.J. The question is, whether this Court has jurisdiction in an appeal from a decision of the Queen's Bench Division discharging a rule for a writ of certiorari to bring up, for the purpose of quashing it, a summary conviction by justices of the peace for trespass in pursuit of game. The question, therefore, turns upon whether this decision of the Queen's Bench Division was "a judgment in a criminal cause or matter" within the last clause of s. 47 of the Judicature Act, 1873. In *Reg* v. *Steel* (2) we held that clause was not confined, as was contended, to the High Court when sitting as the Court to hear points reserved in criminal cases, but extended to all criminal cases in the High Court, and therefore to criminal cases in the Queen's Bench Division. The question here is somewhat wider, whether the exemption from appeal extends to a proceeding in the Queen's Bench Division, which might be said to be not strictly a criminal proceeding in that court, but was a proceeding taken in that court for the purpose of quashing a conviction before justices, which was clearly a criminal proceeding. Was that proceeding in the Queen's Bench Division "a proceeding in a criminal matter?" Now, the intention of the legislature appears to me clearly to have been to leave the procedure in criminal cases substantially unaltered. Matters in the peculiar jurisdiction of the Court of Queen's Bench were transferred to the Queen's Bench Division, and in the same way the Court for Crown Cases Reserved was reconstituted of judges of the High Court, but beyond this it was not intended that there should be any practical alteration in the procedure in criminal cases; and I have no doubt that the clause that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter," was intended to refer to all criminal matters whatever coming before the High Court. I can see no reason why it should not be construed according to its plain meaning, so as to extend to criminal matters on the Crown side of the Queen's Bench. I do not mean to say that the exception extends to all matters on the Crown side of the Queen's Bench Division. There

(1) 10 H. L. C. 704; 33 L. J. (Ex.) 209. (2) Ante, p. 37.

10 Jur. N.S. 446

1876

THE QUEEN v. FLETCHER.

are cases on the Crown side which are really civil cases. This was a conviction for an offence under the criminal law, and although not commenced in the Queen's Bench Division, the proceeding in that Court, in order to obtain a certiorari, was in a matter which was clearly a criminal matter before the justices. If there is an appeal at all, it must lie for both sides. Suppose the rule had been made absolute for a certiorari, and a rule had also been made absolute to quash the conviction, surely the latter would have been a judgment in a criminal proceeding, and I can see no difference between an appeal from a rule to quash and an appeal from discharging a rule for a certiorari. If, then, there were an appeal in the one case, there must also be an appeal in the other, so that it would follow that on every conviction with a small penalty or a few days' imprisonment, there might be an appeal to this Court and so to the House of Lords. I cannot think that the legislature contemplated such a change as this; on the contrary, I think that it was intended that there should be no appeal in any criminal case except the old appeal by writ of error for error on the record. I therefore think that the present case comes within the meaning of the exception in s. 47. It is clearly a criminal matter, it is a proceeding in the Queen's Bench Division, although not commenced there, and therefore it is a proceeding in a criminal matter in the High Court. Sect. 19 of the Act of 1875 throws light upon the construction of the previous Act, and shews that the legislature intended to give no fresh appeal in criminal cases; at least s. 19 assumes this to have been the intention, for it says that the practice in criminal cases in the Court of Appeal shall be the same as before the Act: that was by writ of error, but how could this practice be applicable to the new appeals, if there were any created by the new Act? The practice in the Court of Appeal could not remain the same if the jurisdiction were entirely altered and enlarged. The contention, therefore, of the appellant cannot be maintained, and the exception in s. 47 must extend to all criminal matters in the High Court, which includes the present case.

BRETT, J.A. I am of the same opinion. The only way in which s. 19 of the Act of 1875, as the Lord Justice has said, can be

1876

THE QUEEN v. FLETCHER.

used is as shewing what was to be the interpretation of s. 47 of the Act of 1873. And this was the way s. 19 was used by the Court in *Reg.* v. *Steel.* (1) If you apply s. 19, it says that the practice in criminal cases in the Court of Appeal is to be the same as before the Act, unless it is altered by the rules, that is to say, cases on appeal which were only for error on the record are still to be by writ of error; and the rules were not intended to alter this; but Order LXII. was inserted by the framers of the rules for greater caution, lest some of the rules should be supposed to have changed the practice in criminal cases; and accordingly Order LXII. says that none of the rules shall apply to the Crown side of the Queen's Bench or to criminal proceedings. Sect. 19, however, does no more than say the practice shall remain the same; but it is significant as shewing in criminal cases the legislature thought no fresh appeal had been given by the former Act; but it does not solve the question, and can only be used to assist in interpreting the meaning of s. 47, as we held in *Reg.* v. *Steel.* (1) It was clear that under s. 19 of the Act of 1873 an appeal was given from every judgment or order of the High Court, except so far as it was taken away by something subsequent in the statute, and the question in that case was, how far s. 47 had done this. It was argued that the latter part of s. 47, which clearly only referred to the Court for Crown Cases Reserved in the earlier part, was confined to criminal cases in that court, but the Court held that its scope was much larger, and that it applied to a judgment in any criminal matter whatever in the High Court. In the present case, it is said that judgment must be confined to a judgment in a criminal cause or matter in the High Court itself, and does not extend to a proceeding in a case which has not its inception in the High Court. I cannot agree to that. I should read the clause as meaning "no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter." Is not this "a decision by way of judgment"? There has been a conviction in a criminal matter by justices, and a motion in the Queen's Bench Division for a certiorari for the purpose of determining whether that conviction is good or ought to be quashed; and the Queen's Bench has determined, by discharging the rule

(1) Ante, p. 37.

for a certiorari, that the conviction ought to stand; in other words, the Court has affirmed the conviction. If that is not a proceeding in a criminal matter, I am at a loss to see what is. It is in effect a judgment or decision on the question whether a man shall be fined or imprisoned or not. On the whole, therefore, I think that the intention of the legislature was that there should be no appeal at all in criminal matters beyond what there was before. This case, therefore, follows the judgment in *Reg.* v. *Steel.* (1)

AMPHLETT, J.A. I am of the same opinion. It is argued that this is really a civil proceeding for protecting the civil rights of a person who has a bonâ fide claim to the right of shooting. But that is not so; in substance as well as form it is a criminal proceeding. If the man makes out primâ facie that he is setting up a bonâ fide claim of right, the justices ought to hold their hands; and if they proceed to hear and convict notwithstanding, the Queen's Bench Division will grant a certiorari, even if certiorari is taken away in the particular case, because it is for the purpose of preventing the justices from proceeding without jurisdiction; and when it comes before the Court the purpose is not to determine the civil right, but to determine whether or not the magistrates had jurisdiction, or whether, as it were, the plea to the jurisdiction was a valid plea. It is, therefore, a proceeding in a criminal matter to determine whether the conviction can be sustained; and consequently there is no appeal. It would be most inconvenient if this were not so, and a petty case arising from the killing of a rabbit might be made the subject of appeal to the House of Lords, not to try the civil right, but to determine whether there had been a bonâ fide claim of right before the magistrates.

PER CURIAM:

Appeal dismissed with costs.

Solicitors for appellant: *Bischoff, Bompas, & Bischoff, for E. & E. L. Waugh, Cockermouth.*

Solicitors for prosecutor: *Helder, Roberts, & Gillett, for J. Webster, Whitehaven.*

(1) Ante, p. 37.

1876
Dec. 21.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* ASPINALL AND OTHERS.

Conspiracy to defraud—Sufficiency of Indictment—Obtaining Quotation for Shares of new Company by false Pretences—Official List of Stock Exchange.

In an indictment for conspiracy, the first count stated that "The Stock Exchange" was managed by a committee for general purposes, who had adopted rules and regulations for the conduct of business on the Stock Exchange; and that defendants were promoters of the E. Company, Limited, a new company which had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each in addition to 15,000*l.* represented by 15,000 fully paid-up shares. That by the rules and regulations of the Stock Exchange all persons dealing in the shares of a new company required, for the purpose of making their contracts enforceable according to these rules and regulations, that a special settling day should be fixed by the committee for general purposes, upon which day all shares which had been theretofore bought and sold should be delivered and paid for, &c. That application had been made on behalf of the defendants to the committee to appoint a settling day for transactions in the shares of the company, and that it became necessary that the company should comply with certain rules duly issued by the committee, to the effect, 127, that a settling day would be appointed, provided that no allegations of fraud be substantiated, that there had been no misrepresentation or suppression of material facts, &c.; 128, that, previous to such appliion being submitted to the committee, production of the following documents should be required, the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon. The count then alleged that the plaintiffs conspired to injure and deceive the committee by false pretences (setting them out), and to induce them to appoint a settling day for the company.

Second count: That defendants were promoters of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule, 129, duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of bonâ fide character, &c., that the requirements of rule 128 had been complied with, that two-thirds of the whole nominal capital proposed to be issued had been applied for and unconditionally allotted to the public, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that defendants requested a firm of stock-brokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5000 shares of the company on behalf of alleged vendors of patents, and that defendants unlawfully conspired and agreed by divers false pretences to

injure and deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's liege subjects, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And that defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public was 34,365, and that the amount received thereon, at 10*s.* per share, was 17,282*l.*, that 15,000 had been allotted to the patentee, and that no shares had been conditionally allotted; and thereby induced the committee to order the shares to be quoted in the official list.

A verdict of guilty having been returned, and judgment entered thereon, on error:—

Held, affirming the judgment of the Queen's Bench Division, that the second count was good after verdict, and sufficiently alleged a criminal conspiracy; for that it contained allegations, some accurately and some inaccurately stated, which, assuming them to have been found proved in a sense adverse to the defendants, shewed that there was an agreement by them to cheat and defraud, by means of false pretences, those liege subjects who might buy shares in the company.

A VERDICT of guilty having been returned on the first and second counts of the indictment, the defendants moved, inter alia, in arrest of judgment, and the Queen's Bench Division discharged the rule (1), after which sentence was pronounced and judgment entered up, upon which two of the defendants, Aspinall and C. Knocker, brought error.

First count against Joseph Aspinall, William Whyte, Charles Knocker, John Saunders Muir, and two others: That by a deed made and dated the 27th of March, 1802, an undertaking was proposed to be carried on thenceforth in a building then erected near Throgmorton Street, City, for the transacting of buying and selling the public stocks or funds of this kingdom, and a capital sum of 20,000*l.* had then been subscribed for setting on foot and carrying on the said undertaking under the name of "The Stock Exchange," and was then divided into 400 shares of 50*l.* each, and nine persons were then appointed trustees and managers of the undertaking, and due provision was then made for election of trustees and managers from among the proprietors of the undertaking, to fill up vacancies so that there should be nine such trustees and managers. And for the management and transacting the concerns of the undertaking, thirty persons had, previous to March 27, 1802, been chosen by ballot at a general meeting of the proprietors, a committee for general purposes, and due provision was then made for an annual election by ballot of thirty proprietors of "The Stock Exchange," to act for the term of one year as aforesaid, and the committee for general pur-

(1) 1 Q. B. D. 730.

BIBL. LONDIN UNIV.

1876

THE QUEEN v. ASPINALL.

poses were thenceforth empowered to have the sole management, regulation, and direction of all the concerns of the undertaking, except the treasurership thereof and the direction and management of the buildings; and were empowered to admit such persons, whether proprietors or not, as they should think proper, to attend and frequent the building called the Stock Exchange, for the transacting therein the business of a stockbroker or jobber for one year, to be computed from the 25th of March in each year, and at a price of admission fixed by the trustees and managers aforesaid. And that from and after the date of the deed and at the time of the taking the inquisition, the management, &c., of the concerns of the undertaking, except as aforesaid, had been and were carried on by the committee for general purposes of the Stock Exchange, and who had from time to time adopted rules and regulations for the conduct of business on the Stock Exchange, which were in full force and effect in respect of the members of the Stock Exchange and Stock exchange transactions, and the committee for general purposes had full power and authority to expel any member of the Stock Exchange who violated any of the regulations so adopted, or failed to comply with any of the decisions of the committee. Averment, that heretofore J. Aspinall and W. Whyte had been directors of a public company called the Eupion Fuel and Gas Company, Limited, and one G. P. Knocker had been the secretary and public officer of the company, and S. G. Fry, J. S. Muir, and C. Knocker had been persons aiding and assisting in the establishment of the company, and that the company had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each in addition to 15,000*l.* represented by 15,000 fully paid-up shares, for the purpose of carrying out the objects of the company, and that the company was in all respects a new company. And that all persons dealing in the shares of a new company, according to the rules, regulations, and usages of the Stock Exchange, when such new company had not yet received the appointment of a special settling day in respect of the transactions in the shares of such new company, required, for the purpose of making their contracts and bargains in respect of the shares enforceable according to the rules and regulations of the Stock Exchange, that a special settling day should be fixed by the committee for general purposes of the Stock Exchange, upon which settling day all shares which had been theretofore bought and sold should be delivered and paid for according to the rules, regulations, and usages of the Stock Exchange. And that on April 1, 1874, an application had been made by and on behalf of Aspinall, Whyte, G. P. Knocker, Fry, Muir, and C. Knocker, to the committee for general purposes of the Stock Exchange, to appoint a special settling day for transactions in the shares of the company, and thereupon it became and was necessary that the company should comply with the terms of certain rules duly issued and published by the committee, and which rules were and are as follows:—"127. The committee will appoint a special settling-day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery; and that no impediment exists to the settlement of the account. 128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling-day for transactions in the shares of a new company previous to such application being submitted to the committee, and shall require the production of the following documents, viz. the prospectus, the Act of Parliament,

the articles of association, or a certificate that the company is constituted upon the cost-book system, under the Stannary laws; the original applications for shares, together with the allotment-book signed by the chairman and secretary to the company, and a certificate signed in like manner, stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon; the banker's pass book and a certificate from the bankers, stating the amount of deposits received." And that Aspinall, Whyte, Knocker, Muir, C. Knocker, and Fry, knowing the premises, and contriving and intending to cheat and defraud, had, on the 3rd of February, 1874, unlawfully conspired, combined, confederated, and agreed together, and with divers other persons, to the jurors unknown, by divers false pretences, &c., to injure, deceive, prejudice, and defraud S. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, and to induce them, contrary to the true intent and meaning of the rule hereinbefore recited, to appoint a special settling day on the Stock Exchange for transactions in the shares of the company. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, in pursuance of the unlawful conspiracy, &c., unlawfully and knowingly did falsely pretend to S. H. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, that the number of shares of the company applied for by the public was then 34,365, that the number of shares of the company allotted unconditionally was then 34,365, and that the amount received by the company thereon was, on application, 10s. per share, amounting to the sum of 17,182*l.* 10s., that 15,000 of the shares of the company had then been allotted to the patentee, and that no shares of the company had been conditionally allotted; whereas in truth and in fact, the number of shares of the company applied for by the public was not then 34,365, nor any number, and whereas the number of shares allotted unconditionally was not then 34,365, but the greater part of the shares had been allotted to the applicants for the same upon the condition that they, the applicants, should not be called upon to pay for the same, and whereas the amount received by the company upon the application for the shares was not 17,182*l.* 10s., nor was any amount whatever received by the company from applicants for shares, and whereas 15,000 fully paid-up shares of the company had not been taken by the patentee, &c.

Second count: That at the time of committing the offence hereinafter mentioned, Aspinall and Whyte were directors and G. P. Knocker secretary of the Eupion Fuel and Gas Company (Limited), and Fry, Muir, and C. Knocker were persons aiding and assisting in the establishment of the company, and applications had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the new company in the official list of the Stock Exchange, under and in pursuance of a rule duly issued and published by the committee as follows:—"129. The committee will order the quotation of a new company in the official list, provided that the company is of bonâ fide character and of sufficient magnitude and importance; that the requirements of rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the Act of Parliament or the articles of association, and, in the case of limited companies, contains the memorandum of association; that it provides for the issue of not less than one half of the nominal capital, and for the payment of ten

1876

THE QUEEN v. ASPINALL.

per cent. upon the amount subscribed; and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up, with the amounts of each respectively, and also states the amount paid or to be paid in money or otherwise to concessionaires, owners of property, or others, on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted; that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others, not being counted in such two-thirds) have been applied for and unconditionally allotted to the public; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. In cases where fully paid-up shares have been granted in lieu of money payments, an official certificate will be required that the contract providing for the issue of such shares has been filed with the registrar of joint stock companies, as prescribed by the 25th section of the Companies Amendment Act, 1867." Averment: That the defendants had applied to and requested one Sir R. W. Carden and others, a firm of stockbrokers and members of the Stock Exchange, and authorized them to give the information hereinbefore mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list of the Stock Exchange and G. P. Knocker had employed them to sell 5000 shares of the company on behalf of certain alleged vendors of patents, and they had bargained for the sale of 300 of the shares. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, did, on the 3rd of February, 1874, unlawfully conspire, combine, confederate, and agree together, and with divers other persons whose names were to the jurors unknown, by divers false pretences, and artful and subtle means, devices, and stratagems, to injure and deceive the said members of the committee, and to induce them, contrary to the true intent and meaning of the rules in this count and in the first count of the indictment mentioned, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules and regulations of the said undertaking in the first count of this indictment described and mentioned, to wit, the said Stock Exchange, so as to entitle the company to have their shares quoted in the official list of the said Stock Exchange. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, and the other persons, &c., in pursuance of the unlawful conspiracy, combination, confederacy, and agreement, unlawfully and knowingly did falsely pretend to De Zoete, Fenn, and others, members of the committee, &c., that the number of shares of the company applied for by the public was then 34,365, and that the amount received by the company thereon was on application 10*s.* per share, amounting to the sum of 17,182*l.* 10*s.*; that 15,000 of the shares had then been allotted to the patentee; that no shares had been conditionally allotted; and did thereby induce the committee for general purposes of the Stock Exchange to order the shares to be quoted in the official list of the Stock Exchange on and after the 28th of May, 1874.

The record having been formally made up, the defendants, Aspinall and C. Knocker, assigned as error :—

1. That neither the first nor the second count of the indictment discloses any criminal offence.

2. That the first count charges merely a conspiracy to deceive and defraud the committee of the Stock Exchange, and to induce them to appoint a settling day, and does not go on to aver an intent to defraud them or any one of goods, money, or otherwise, or that any fraud was intended to result or would probably result from such appointment.

3. That the second count charges only a conspiracy to injure and deceive the committee, and to induce them to order a quotation of the shares of the company, and thereby induce persons who should thereafter buy and sell such shares to believe that the company was duly formed, and had complied with the rules of the Stock Exchange so as to be entitled to have the shares quoted. That it contains no averment that it was to defraud the committee of money, goods, chattels, or otherwise, or that it was intended thus to defraud such prospective buyers or sellers, or that any fraud would probably result therefrom.

4. That fraudulently and deceitfully to induce the committee to appoint a settling day or to order a quotation of shares is not necessarily unlawful in a criminal sense, and it is not shewn in either count to be so unlawful by an averment that criminal fraud was intended or would probably result therefrom.

5. That to render a conspiracy indictable, either the means used or the object of the conspiracy must be unlawful, that neither of the counts shews either the means or the object to be criminally unlawful.

6. That it is quite consistent with the averment in both the counts that the company was good financially, and that the defendants Aspinall, Whyte, Muir, and Knocker, only induced by irregular, but not by criminal or unlawful, means the committee to appoint a settling day and to order a quotation of shares, without intending ultimate fraud being a necessary or a probably result; and that an inference of such fraud ought not to be drawn, especially as it is negatived by the fact that the said defendants were acquitted and found not guilty upon the last count which avers an intent thus to defraud the public of money.

7. That the only objects of the conspiracy averred in the first and second counts are to induce the committee to appoint a settling day and to order a quotation of shares, and to induce probable buyers and sellers to believe that the rules of the Stock Exchange had been complied with and that the quotation of shares was properly made, but no inference of an intended fraud upon the public ought to be drawn therefrom, because it is too remote, and because the jury negatived all the suggestions of intended fraud made in the other counts by finding the said defendants not guilty thereon.

Nov. 27. *Benjamin, Q.C.*, and *Metcalfe, Q.C.*, for the defendant Aspinall, insisted upon all the assignments of error. The first count is clearly bad, the only intent alleged is to deceive the committee of the Stock Exchange. As to the second count,

1876

THE QUEEN. v. ASPINALL.

Rex v. *De Berenger* (1) was and will be relied on by the prosecution: but there are allegations there to which there are no corresponding allegations in the second count. In that case the false pretences were specified. The mere telling of lies, which is all the second count alleges, is not indictable. In *Reg.* v. *Warburton* (2) Cockburn, C. J., says: "It has been doubted sometimes whether the law of England does not go too far in treating as conspiracies agreements to do acts which, if done, would not be criminal offences." In *Rex* v. *Dixon* (3) the natural consequence of the act charged was injury to the health of the persons eating the bread; but here the injury to the prospective dealers in the shares is too remote to be inferred. Moreover, the names of the buyers ought to have been alleged, as was held in *King* v. *Reg.* (4) in error.

[BRETT, J. A. In that case it was said that, if the conspiracy had been alleged to be to cheat any indefinite individuals who might deal with the defendants, that would have been sufficient. That is the mode of allegation here.]

In the present case there is no averment of any intention to injure anybody beyond the intent to deceive the Stock Exchange committee, and to induce the dealers to believe certain facts. There is no allegation that it was with intent to defraud these persons, nor is there any allegation that the belief would have been unfounded. If the second count of this indictment be held good, it will be going much further than any case has yet gone. Nothing is distinctly alleged, neither the false pretences, nor the intention to defraud, nor, where the overt acts are set out, is it alleged in what way the statements made by the defendants were false. All the statements might be false, and yet the company might have been entitled to a quotation on the Stock Exchange. In order to support this count it is necessary to assume everything against the defendants, but this cannot be done even after verdict.

Nov. 29. *C. Bowen*, for the defendant C. Knocker, insisted chiefly on the want of any allegation that the belief which was

(1) 3 M. & S. 67.
(2) Law Rep. 1 C. C. at p. 276.
(3) 3 M. & S. 11.
(4) 7 Q. B. 795.

induced by the defendants in the purchasers was unfounded. If it were said to be a belief that the company had complied with rules which they had not really complied with, non constat that the rules not complied with had any relation to the value of the shares, so as to affect the price, and if so there would be no fraud on the purchasers. [He cited, in addition to cases already referred to, *Spiers* v. *Parker* (1); *Bishop* v. *Hayward* (2); *Rex* v. *Fuller* (3); *Reg.* v. *Peck* (4); *Rex* v. *Fowle.* (5)]

Sir H. S. Giffard, S.G. (with him *Poland* and *Besley*), for the Crown. [The Court directed him to confine his arguments to the second count.] The second count is good after verdict. There is no distinction, as to what insufficient averments are cured by verdict, between civil and criminal pleadings: *Heyman* v. *Reg.* (6) So in *Reg.* v. *Goldsmith* (7), on an indictment for receiving goods knowing them to have been obtained by false pretences, it was held no objection after verdict that the false pretences were not alleged nor negatived. That is a stronger case than the present, because the nature of the false pretences was material in order to shew that they were criminal within the statute; but the Court held that it must be assumed after verdict that false pretences within the statute had been proved. This is not an indictment for false pretences, but for conspiracy. In the one, the false pretences must be set out and negatived, and those allegations must be proved, and it must also be proved that the pretences were false to the knowledge of the defendants, and that the goods were obtained by the false pretences. Whereas, in the case of a conspiracy, the conspiring is the essence of the crime, and the pretences need not be set out, non constat that they had been agreed upon. It may be that defendants only agreed to make such false statements as should turn out to be necessary when the time came to deceive the committee. Unless the Court is prepared to overrule *Sidserf's Case* (8) and *Gill's Case* (9), it cannot be contended that the false pretences need be alleged; à fortiori, if any are

(1) 1 T. R. 141.
(2) 4 T. R. 470, 472.
(3) 1 Ld. Raym. 509.
(4) 9 A. & E. 686.
(5) 4 C. & P. 592.
(6) Law Rep. 8 Q. B. 102, 105.
(7) Law Rep. 2 C. C. 74.
(8) 11 Q. B. 245.
(9) 2 B. & Ald. 204.

1876

THE QUEEN v. ASPINALL.

alleged it is unnecessary to negative them, and after verdict it must be taken that they were false.

[MELLISH, L.J. The only difficulty, as it seems to me, is that there is no intent to defraud alleged.]

A person must be taken to intend the ordinary and natural consequence of his acts; and if there is an allegation of acts of which the ordinary and natural consequence is to defraud, then after verdict it must be taken that the defendants did the acts with intent to defraud. Moreover, this intention is in effect alleged by the statement that the defendants "unlawfully" conspired. And the nature of the overt acts alleged may also be used to interpret the meaning of previous allegations.

Benjamin, Q.C., in reply. *Rex* v. *Perrott* (1) is a direct authority that it is not enough to allege the false pretences, and the truth must be negatived.

[BRETT, J.A. That was an indictment for obtaining money by false pretences. *Reg.* v. *Gompertz* (2) is a direct authority to the contrary as to an indictment for conspiracy.]

In that case there was an allegation of intent to defraud of money. There is no such allegation here.

Cur. adv. vult.

Dec. 21. The following judgments were delivered:—

BRETT, J.A. Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to shew that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to shew that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged.

(1) 2 M. & S. 379. (2) 9 Q. B. 824.

The first allegation thus mentioned is always contained in the preliminary assertion that the accused did the thing or things complained of "fraudulently," "falsely," "unlawfully," or "feloniously," &c. And that is the whole effect of this preliminary allegation.

The necessity and the form of the allegations may be exemplified in an indictment for false pretences or perjury. To support a charge of obtaining money, &c., by false pretences, it is necessary to shew, and, therefore, to allege, that the prisoner, with a wicked or criminal mind, stated something which, if, true, would be an existing fact; that he did so with intent to procure the possession of money, &c.; that he knew his statement was—that is to say, that so far as his mind was concerned he intended that his statement should be—false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money, &c.; that the statement was in fact untrue, in the sense of being incorrect. And both the last allegations are necessary facts of the charge; for although the accused had a criminal intent, and believed that his statement was false, yet if in fact either the prosecutor was not thereby persuaded, or by chance the statement was not incorrect, the charge is not supported, the crime is not committed. And it was for want of the allegation, that the pretences relied on by the prosecutor as the material false ones were in fact untrue, that the indictment was held bad in *Rex* v. *Perrott*. (1) So in perjury it is a necessary allegation that the statement on oath relied upon as perjury was false in fact, in the sense of being incorrect in fact. Though the accused believed he was swearing a falsehood, and was thereby morally perjured, yet if by chance his statement were true in fact, he could not be convicted of perjury.

There is another rule with regard to pleading which must be enunciated, the rule with regard to the effect to be given to pleadings after verdict. It is thus stated in *Heyman* v. *Reg.* (2): "Where an averment, which is necessary for the support of the pleading, is *imperfectly stated*, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue

(1) 2 M. & S. 379.

(2) Law Rep. 8 Q. B. 102, 105.

1876

THE QUEEN v. ASPINALL.

without proof of *this* averment, then, after verdict, the *defective averment,* which might have been bad on demurrer, is cured by the verdict." Upon this it should be observed that the averment spoken of is "an averment imperfectly stated," i.e. an averment which is stated but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused.

Another rule is, that in considering an indictment on a writ of error, and, therefore, after verdict, it is not necessary for, and it is not open to, the Court to inquire what facts were proved at the trial. The question is, whether assuming the facts which are accurately alleged in the indictment to have been proved as alleged, and the facts which are imperfectly alleged to have been proved in a sense adverse to the accused, the charge would be supported. If it could, the indictment, on error after verdict, is sufficient. But if, assuming both the above-mentioned allegations of facts, the perfect and imperfect allegations, to be proved respectively as before stated, the charge would not be supported for want of the existence of some other allegation, affirmative or negative, which has been totally omitted, then the indictment is bad notwithstanding the verdict. The verdict is only to be taken as conclusive evidence that the facts alleged in the indictment accurately and inaccurately were proved in a sense adverse to the accused. If those facts so proved would not support the charge, the indictment is bad on a writ of error.

In order to apply these rules to the present case it is necessary next to determine what are the essential facts to be alleged in order to support a charge of conspiracy. Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Neverthe-

less the crime is complete; it was completed when they agreed. It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enunciate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are if done by themselves forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy: see *Reg.* v. *Warburton.* (1) There may be and probably are others.

If the second count in this indictment contains averments sufficiently stated which are enough to shew sufficiently that the defendants unlawfully, i.e. with minds intending to do wrong, agreed by false pretences to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy within the last rule above enunciated; for if any person were cheated by false pretences into purchasing a commodity which but for such falsehood he would not have purchased, it is undoubted that he could maintain some suit for relief or remedy founded on the falsehood and fraud thus perpetrated on him. This is the case of *Rex* v. *De Berenger.* (2) It was there held that it was a criminal conspiracy to agree to endeavour to raise the price of the public funds on a particular day by false rumours. This was not because it is an injury to the public to raise the value of the public funds; but because it is fraudulent against those who purchase a *vendible commodity* to raise the price of it at the time they purchase it by fraudulent falsehoods on which they are intended to act. The conspiracy was held to be criminal, not because the article to be dealt in was the public funds, but because the public funds were a *vendible commodity.* And it was held that the offence was complete the moment the agreement was made; and that it was unnecessary to specify the persons who became

(1) Law Rep. 1 C. C. 274. (2) 3 M. & S. 67.

1876

THE QUEEN v. ASPINALL.

purchasers. It may be well to notice, too, that the judges did not shrink from acting judicially on the knowledge that the public funds were a vendible commodity.

The question, therefore, is whether there are in the second count of this indictment allegations, some accurately and some inaccurately stated, which, assuming them to be proved in a sense adverse to the defendants, shew that there was an agreement to cheat and defraud by means of false pretences those who might buy shares in the company named.

The wicked mind or intention of the defendants is alleged in the usual form, namely, that they "unlawfully agreed."

There is an allegation that they agreed to use "false pretences." It was urged that this was too general, and therefore unjust. The same argument was used and overruled in *Rex* v. *Gill* (1), *Reg.* v. *Gompertz* (2), and in *Sydserff* v. *Reg.* (3)

There is an allegation that the defendants agreed by false pretences "to deceive the members of the committee of the Stock Exchange, and to induce them, *contrary to the true intent and meaning of the said rules hereinbefore in this count and in the first count mentioned,* to order a quotation of the shares of the company in the official list of the stock exchange." Much minute criticism was exercised on this allegation; but it seems certainly capable, if found to be proved in a sense adverse to the defendants, of bearing this construction,—"that the defendants agreed to make such false pretences as might appear necessary to deceive the committee, when the time for them to order should come, into ordering a quotation as if the rules had been fulfilled." You do not deceive a person into doing a thing contrary to rules if the rules have been fulfilled. It was said that it was unfair and unjust not to point out to the defendants which of the rules, or what part of the rules it was suggested they intended should not be observed. This is the argument which was urged in *Gill's Case* (1) and the others, against the general allegation that the defendants agreed to use "false pretences." The answer to such an objection is, that the agreement in those cases may not have determined what the pretences should be, or in this case which rule or which part

(1) 2 B. & Ald. 204. (2) 9 Q. B. 824.
(3) 11 Q. B. 245.

of a rule should not be observed. The agreement may have been to deceive the committee, by any falsehood which would do so, into believing that whatever part of the rules should turn out to be, in fact, incapable of being fulfilled had been fulfilled. As for instance, if two-thirds of the whole nominal capital proposed to be issued should not in fact, when the time for procuring the order for quotation should arrive, have been applied for and unconditionally allotted to the public, to deceive the committee by false pretences into believing that they had been, and so that rule 128 had been complied with.

The next allegation is: "and thereby to induce and persuade divers of the liege subjects who should thereafter buy and sell the shares of the said company to believe that the said company was duly formed and constituted and had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the said company to have their shares quoted in the official list of the said Stock Exchange." Take this to be proved in a sense adverse to the defendants, and it is certainly capable of this construction,—that the defendants agreed to deceive the committee into granting a quotation, as if the rules authorizing a quotation had been complied with, although such rules should not have been complied with in particulars which, if the committee had not been deceived, would have prevented them ordering the quotation, and that the agreement of the defendants further was, that they would thereby, if they could, induce the purchasers of shares to believe that the rules had been complied with, although they should not have been in essential particulars. It is not sensible to suppose that they agreed, by deceiving the committee, to induce purchasers to believe that the rules had been fulfilled only when the rules had in fact been fulfilled. In such case there could be no need to deceive or to use false pretences.

It was objected that the Court could not take judicial notice that a non-compliance with the rules set out in the count would, if known, depreciate the price of shares. That is like suggesting that the judges in *Rex* v. *De Berenger* (1) ought not to have taken judicial notice that the public funds were vendible commodities. But judges are entitled and bound to take judicial notice of that

(1) 3 M. & S. 67.

1876

THE QUEEN v. ASPINALL.

which is the common knowledge of the great majority of mankind and of the great majority of men of business. They are, therefore, in these days bound to take notice that shares in limited companies are a vendible commodity; and that a purchaser of ordinary intelligence would prefer to purchase shares in a limited company which had fulfilled the requirements of rule 128, rather than in the same company when it had not fulfilled those requirements. They must, if that be true, also take notice that a quotation of a company by persons, entrusted to examine whether such requirements had been fulfilled, and further entrusted not to allow such a quotation unless those requirements have been fulfilled, must have some effect on the mind of an ordinary purchaser of shares as to whether he would or would not purchase, or as to the price he would give. And, therefore, the Court may and must take judicial notice that the agreement imputed in the count to the defendants is an agreement to deceive the committee, and thereby, that is to say by such deceit, to induce and persuade a purchaser to believe, at the moment he is making up his mind to purchase, in the existence of circumstances which do not in fact exist, the existence or non-existence of which must affect his decision if he be of ordinary intelligence.

It is not stated that this agreement was made with intent to cheat and defraud. The statement, therefore, may be said to be imperfect. But to come to such an agreement with an evil mind is to agree to cheat and defraud. And the finding by a jury in a sense adverse to the accused that such an agreement to induce such a belief was come to, is to find that the agreement was come to with a wicked mind, that is to say, with an intent to cheat and defraud. If that be so, the count is, as has been said, sufficient on error after verdict.

The case of *King* v. *Reg.* (1) was strongly relied on by the defendants. But it does not seem to us to be applicable. The defect, on which the Court of Exchequer Chamber acted in that case, was that the indictment charged a conspiracy to cheat and defraud "certain liege subjects being tradesmen." It was held that such an allegation in such form in pleading meant "certain definite tradesmen alleged to be known to the defendants at the

(1) 7 Q. B. 782.

time of the criminal agreement," and, therefore, that such definite tradesmen ought, in describing the conspiracy, to be named, or an excuse be averred for not naming them. If the second count in the present case had not averred that the persons intended to be induced to believe, &c., were those "who should thereafter buy and sell shares," the case would have been applicable, but as this indictment has such an allegation the case is not applicable. If in that case there had been added after the words "being tradesmen" the phrase "who should thereafter deal with the defendants," the indictment in that case would have been sufficient according to *Rex* v. *Gill* (1), *Reg.* v. *Gompertz* (2), and *Sydserff* v. *Reg.* (3)

We are of opinion, therefore, that the second count in this case is sufficient after verdict. We give no opinion whatever as to the first count.

The judgment of the Court of Queen's Bench must be affirmed.

AMPHLETT, J.A. The only question which we considered necessary to have fully argued before us was the sufficiency of the second count of the indictment to support the conviction of the defendants of a criminal conspiracy.

This count begins by stating that the defendants were directors or persons aiding in the establishment of the Eupion Fuel and Gas Company, Limited, and that application had been made to the committee for general purposes of the London Stock Exchange to order the quotation of the shares of the new company in the official list of the Stock Exchange under rule 129, duly issued and published, by which the committee were to order the quotation of a new company in the official list, provided that the company was of a bonâ fide character, and of sufficient magnitude and importance, and that the requirements of rule 128, set out in the first count, and the further requirements of rule 129 were complied with. Those requirements were evidently calculated and intended to insure as far as possible the respectability and solvency of any new company before it was allowed to be quoted in the official list, and among others there were the following important requirements,

(1) 2 B. & Ald. 204. (2) 9 Q. B. 824.
(3) 11 Q. B. 245.

1876

THE QUEEN v. ASPINALL.

viz. that, in case of limited companies, the memorandum of association provided for the issue of not less than one half of the nominal capital, and for the payment of 10 per cent. upon the amount subscribed, and that two-thirds of the whole amount of the capital proposed to be issued (with certain exceptions not necessary to be here stated) should have been applied for and unconditionally allotted to the public.

Now, as the rules of a public body of such celebrity as the London Stock Exchange must be widely known to brokers and others dealing with shares, it is plain that to obtain a quotation of their shares in the official list must be advantageous to companies, and enhance the value of their shares. Purchasers, on seeing the shares so quoted, would have a right to believe that the requirements of the Stock Exchange had been complied with, and that the company whose shares they proposed to purchase had, therefore, satisfied an independent body like the committee of its respectability and solvency, and it cannot be doubted that they would be willing to give a higher price for the shares in consequence. This being so, I think it is established by the case of *Rex* v. *De Berenger* (1) that a conspiracy to procure by fraud and falsehood the shares of a company to be quoted in the official list, and thus give a fictitious value to the shares beyond what they would otherwise bring in the market, is a fraud upon the public, and an indictable offence.

This, in fact, was not denied on the part of the defendants; but it was contended that the averment of the conspiracy in the second count was not sufficient, even after verdict, to sustain the charge. That averment, omitting for the moment the overt acts subsequently charged, was as follows: That the defendants did "unlawfully conspire, combine, confederate, and agree together, and with divers other persons whose names are to the jury unknown, by divers false pretences and artful and subtle means, devices, and stratagems, to injure and deceive the said members of the said committee, and to induce them, contrary to the true intent and meaning of the said rules hereinbefore in this count and in the first count of this indictment mentioned, to order a quotation of the shares of the said company in the official list of

(1) 3 M. & S. 67.

the said Stock Exchange, and thereby to induce and persuade divers of the liege subjects of our said Lady the Queen who should thereafter buy and sell the shares of the said company to believe that the said company was duly formed and constituted, and had in all respects complied with the rules and regulations of the said undertaking in the first count of this indictment described and mentioned, to wit, the said Stock Exchange, so as to entitle the said company to have their shares quoted in the official list of the said Stock Exchange."

In the first place, it was objected that there is no allegation of any design to injure and deceive purchasers, but only the members of the committee of the Stock Exchange. That omission, however, appears to me immaterial, if the natural and probable effect of deceiving the committee in the mode alleged would be to injure and deceive purchasers.

It was further objected that there is no allegation of any design to give a fictitious value to the shares, and that it ought not to be inferred in a criminal case; but here again I think that, if the design alleged was to induce purchasers to believe that the position and prospects of the company were better than they really were, the further design of inducing such purchasers to give a higher price for the shares, being the natural and probable consequences, ought to be inferred: see *Rex* v. *Dixon*. (1)

But then it was argued with great force by Mr. Bowen that there is no allegation that what the purchasers were to be induced to believe was, in any respect that could affect the price of the shares, untrue, in which case it must be admitted that there could be no fraud upon the purchasers. Now the facts which the purchasers were to be induced to believe are as follows: first, that the said company was duly formed and constituted, which certainly is not negatived; and, secondly, that they had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list, and this is not in any way negatived, except by the allegation that the design was by false pretences to induce the committee, contrary to the true intent and meaning of the said rules in the second count and in the first count mentioned, to order the quota-

(1) 3 M. & S. at p. 15.

1876

THE QUEEN v. ASPINALL.

tion. And, looking at those rules, it will appear that some of them relate merely to the convenient transaction of business by the committee of the Stock Exchange, and, whether complied with or not, could have no effect upon the value of the shares in the market. It would, therefore, it was urged, be consistent with all the allegations of the conspiracy that the only rules which the purchasers were to be induced to believe, contrary to the fact, had been complied with, were such as could not by possibility affect, in the mind of the purchasers, the value of the shares. This appears to me a serious objection; and I have considerable doubt whether it is cured by the overt acts alleged in the subsequent part of the count; for, in the first place, it was held in the case of *Rex* v. *Perrott* (1) that an indictment for obtaining money under false pretences must negative by special averment the truth of the pretences, and that it is not enough, even after verdict, to charge that the defendant falsely pretended a number of different facts; and I think that the reasoning of the judges in that case applies as much to an indictment for conspiracy as to an indictment for false pretences, where, as in this case, the unlawfulness of the end depends upon the nature of the false pretences employed to attain it, and where, therefore, the ordinary rule, that the false pretences need not be specially alleged in an indictment for conspiracy, does not, in my opinion, apply. And, in the next place, the false pretences alleged are not necessarily inconsistent with full compliance with the rules; since, for instance, though it may have been falsely asserted, as is alleged, that the number of shares allotted unconditionally was 34,365, and that 10 per cent. had been paid thereon, and that no shares had been conditionally allotted, yet it may be true, for anything that appears, that two-thirds of the whole amount of the nominal capital had been applied for and allotted unconditionally, and 10 per cent. paid thereon, which was all that the rules required.

Under these circumstances I am by no means sure that this defect would not have been fatal to the count on demurrer or a motion to quash it; but it appears to me to be just one of those defects which, according to the rule laid down in Serjeant Williams' Notes to Saunders, vol. i. p. 261, and acted upon in the two

(1) 2 M. & S. 379.

1876

THE QUEEN v. ASPINALL.

cases cited by the Solicitor General, of *Heyman* v. *Reg.* (1) and *Reg.* v. *Goldsmith* (2), is cured by verdict.

No injustice can be done to the defendants by acting upon this rule, because it must be assumed that the judge properly directed the jury as to what false pretences must be proved to justify a conviction. Upon the whole, therefore, I am of opinion that the count is sufficient to sustain the conviction, and that the error assigned cannot be allowed. Having arrived at this conclusion, it is not necessary for me to express, and I abstain from expressing, any opinion, upon the validity of the first count.

BRETT, J.A. Lord Justice Mellish concurs in the judgment which I have delivered.

Judgment affirmed.

Solicitors for the prosecution: *Abrahams & Roffey.*
Solicitor for Aspinall: *Golding.*
Solicitors for Knocker: *Wontner & Sons.*

[IN THE COURT OF APPEAL.]

Dec. 6.

THE METROPOLITAN BOARD OF WORKS *v.* THE NEW RIVER COMPANY.

Practice—Order to have Point of Law decided before Issues of Fact—Order XXXIV., Rule 2.

A judge has power, under Order XXXIV., Rule 2, after writ and appearance, and before statement of claim, to order a point of law to be decided by statement of special case or otherwise.

The Court of Appeal will not interfere with the discretion of the Court below, except in an extreme case.

APPEAL from the decision of the Queen's Bench Division affirming an order of a judge under Order XXXIV., Rule 2, that the question in this action be stated in the form of a special case for the decision of the Court. (3)

The writ of summons was indorsed: "The plaintiffs claim damages from the defendants for refusing to supply them with

(1) Law Rep. 8 Q. B. 102, 106. (2) Law Rep. 2 Cr. C. 74, 79.
(3) 1 Q. B. D. 727.

1876

METROPOLITAN BOARD OF WORKS v. NEW RIVER COMPANY.

water by meter in accordance with the provisions of s. 41 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), and a mandamus." The defendants having appeared, the plaintiffs obtained the order, on an affidavit, uncontradicted by the defendants, that there are no facts in dispute, and the only question is one of law, whether the defendants are bound under s. 41 to supply the plaintiffs with water by meter for the purpose of watering the roads, and that such question will most conveniently be raised for the decision of the Court by the statement of a case.

Sir H. S. Giffard, S.G., and *A. E. Hardy*, for the defendants. There is no power under Order XXXIV., Rule 2, to make any order before the statement of claim. What the rule means is that it must appear to the Court or judge from the record that there is a question of law which can be more conveniently disposed of before any question of fact. Secondly, in the present case it is clear that if the statement of claim had been made, in which case the defendants could have demurred, that would have been a much more convenient mode of deciding the question of law, and would have obviated any further proceedings.

Biron, for the plaintiffs. What the question between the parties is appears from the writ, and the plaintiffs' affidavit is uncontradicted that there are no questions of fact in dispute.

COCKBURN, C.J. Had the matter come before me in the first instance I doubt whether I should have made the order; and I am very much inclined to agree with the defendants' counsel, that the question would have been more conveniently tried by a demurrer to the statement of claim; but this Court will not interfere with the discretion exercised by the Court below except in an extreme case. It is too narrow a construction of the rule to limit its application to cases in which the point of law appears on the record; it is competent to the judge to look at the circumstances of the case, in whatever way they are brought to his knowledge; and if it is brought to his knowledge, whether from the statements on the record or otherwise, that there is a question of law which may be conveniently decided before the issue of fact is tried, he may make an order to carry that out. Here it is stated

on affidavit, uncontradicted by the defendants, that there are no facts in dispute, and the judge and the Queen's Bench Division have ordered in their discretion that a special case be stated. It is not a case in which we ought to interfere with that discretion.

BRAMWELL, J.A., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Solicitors to Board.*
Solicitors for the defendants: *Baxters & Co.*

[IN THE COURT OF APPEAL.]

Dec. 21.

RUSTOMJEE *v.* THE QUEEN.

Petition of Right—Treaty by the Queen with a Foreign Sovereign—Money received under the Treaty from Foreign Sovereign on Account of Debts due to British Subjects—Prerogative of the Crown.

14 CLD 314
5 CPD 47

By a treaty between the Queen of England and the Emperor of China, the Emperor agreed to pay to the British government 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent being largely indebted to British subjects. The money having been received by the British government:—

Held, affirming the judgment of the Queen's Bench Division, that a petition of right would not lie by one of the British subjects to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants, on the grounds: 1. That there was nothing in the terms of the treaty to make the Crown agent or trustee in respect of any specific sum for the suppliant or any other person: 2. That in all that relates to the making and performing of a treaty with another sovereign, the Crown cannot be either a trustee or agent for any subject.

APPEAL by the suppliant from the judgment of the Queen's Bench Division in favour of the Crown on demurrer to a petition of right. (1)

The petition is set out at length in the report in the Court below, but the material parts are stated in the judgment of the Court of Appeal.

Nov. 3, 4. *Benjamin, Q.C.* (*Cock* with him), for the suppliant. First, assuming that the Crown can be an agent or trustee, a petition of right is the proper mode of proceeding to obtain

(1) 1 Q. B. D. 487.

1876

RUSTOMJEE v. THE QUEEN.

redress: see *Baron de Bode* v. *Reg.* (1), per Lord Denman, C.J., and in the Exchequer Chamber (2), per Parke, B. In the House of Lords (3) the case was ultimately decided on the ground that the Act of Parliament under which the suppliant claimed pointed out the remedy to be pursued. In *Churchward* v. *Reg.* (4), again, the point was not raised. But in *Thomas* v. *Reg.* (5) it was held, on the authority of the *Bankers' Case* (6), that a petition will lie for a breach of contract by the Crown. It appears to have been assumed in the court below, that the Crown could neither be agent nor trustee. First, as to agency, there was an agency assumed by the Crown. The list of debts contained the suppliant's claim, and that was taken into account, and it was promised by the agent of the Crown that it should be insisted upon and paid, and this was afterwards ratified by the receipt of the money. Secondly, it is said that the Crown cannot be a trustee. This might once have been the law; but modern writers hold the contrary doctrine, that the king can be a trustee, and this is borne out by the authorities. One of the prerogatives of the Crown is to be a trustee: see statute 17 Edw. 2. (7) So in notes to *Smith* v. *Upton* (8) many cases are cited of petitions of right for pecuniary demands against the Crown, and amongst others, "by lords for their rents of lands in the hands of the king by reason of wardship." In 1 Sanders on Uses, p. 389, it is said the king or a corporate body may be a trustee, citing *Kildare* v. *Eustace* (9) and *Penn* v. *Baltimore* (10): see also Chitty on Prerogative, pp. 340–2, citing Staundford, Prærog. Reg. c. 22, fol. 74a–75b. In *Pawlett* v. *Attorney General* (11) Hale, C.B., was of opinion that an equity of redemption might be enforced against the Crown as a trustee. In *Penn* v. *Baltimore* (10) Lord Hardwicke asks why may not the Duke of York, after he became king, be a royal trustee. In *Reeve* v. *Attorney General* (12) and *Burgess* v. *Wheate* (13) are

(1) 8 Q. B. at pp. 270–4.
(2) 13 Q. B. at pp. 383–4.
(3) 3 H. L. C. 449.
(4) Law Rep. 1 Q. B. 173.
(5) Law Rep. 10 Q. B. 31.
(6) 14 How. St. Tr. 1.
(7) 1st vol. of Revised Statutes, p. 131.
(8) 6 Man. & G. at pp. 252, 254.
(9) 1 Vern. at p. 439.
(10) 1 Ves. Sen. at p. 453; 2 Tu. L. C. at p. 936.
(11) Hard. 465.
(12) 2 Atk. 223.
(13) 1 Eden, Ch. 177.

dicta all shewing that the ancient doctrine that the Crown cannot be a trustee is exploded.

Sir J. Holker, A.G. (with him *C. Bowen*) for the Crown. It is unnecessary in the present case to contend that in no case can the Crown be agent or trustee for a subject. Assuming the contrary of that proposition, there are no facts here from which to imply either of those relations between the Queen and the suppliant. First, assuming Captain Elliot or Sir H. Pottinger did promise, as alleged in the petition, they had no authority to do so, and in order to make a ratification valid the promise must have been made by an agent. Secondly, in order to make the person receiving money a trustee there must have been an intention on the part of the person paying it to create a trust. In Lewin on Trusts, p. 72, 6th ed., it is laid down that in order to create a trust there must be an intention on the part of the settlor to create a trust, citing *Gaskell* v. *Gaskell* (1), *Hughes* v. *Stubbs* (2), and *Smith* v. *Warde* (3), which fully bear out the author's proposition. Lastly, to say that the Crown, in exercising one of its highest prerogatives, that of making treaties with another sovereign, could in any sense be acting as the agent or trustee of a subject is contrary to the first principles of the constitution.

Cock was heard in reply.

Cur. adv. vult.

Dec. 21. LORD COLERIDGE, C.J. In this case, which was argued some time since before Lord Justice Mellish, Sir Baliol Brett, Sir Richard Amphlett, and myself, I now proceed to deliver our unanimous judgment.

This was a petition of right founded upon a claim which, if it ever had any foundation at all, arose thirty-six or thirty-seven years ago, and is of a kind which it was admitted in argument before us had never before been put forward. Something like it was indeed attempted in *Baron de Bode's Case* (4), but the claim received no countenance from the Courts, and that case itself was decided upon a ground which left the question before us unaffected, at least directly, by the decision.

The suppliant asserts, and for the purpose of this judgment it

(1) 2 Y. & J. 502.
(2) 1 Hare, 476.
(3) 15 Sim. 56.
(4) 8 Q. B. 208; 13 Q. B. 364 3 H. L. C. 449.

1876

RUSTOMJEE v. THE QUEEN.

may be assumed asserts correctly, that a firm of Chinese merchants owed him in the year 1838 a considerable sum of money. While the correctness of the claim was under investigation, and before, according to Chinese practice, any result was arrived at, or the amount of it was ascertained or admitted between the suppliant and the parties from whom he claimed, the Chinese war broke out, and the suppliant, with other British subjects, was expelled from China. The suppliant states that Captain Elliot, the superintendent of trade, and Sir Henry Pottinger, who succeeded Captain Elliot as British Plenipotentiary, and who negotiated as such Plenipotentiary the treaty of peace with China at the end of the war, both recognised the justice of the suppliant's claim against the Chinese merchants. He states that Captain Elliot promised that Her Majesty would compel the Chinese government to pay it; and that Sir Henry Pottinger promised that the claim, amongst a number of others, should be insisted on against the Chinese government, and that the amount of the claims should be paid to the claimants when received from the Chinese government. He goes on to say, that in August, 1842, a treaty of peace was entered into between Her Majesty and the Emperor of China, that one of the articles of the treaty was that the Emperor should pay to Her Majesty 3,000,000 dollars as and for the amount of debts due to British subjects, of whom the suppliant was one, by Chinese merchants; that the sum of 3,000,000 dollars was computed on the basis of claims sent in by British merchants to Captain Elliot, of which claims the suppliant's was one; and that the sum of 3,000,000 dollars was paid by the Emperor of China to the Plenipotentiaries of Her Majesty for the purpose of paying the said claims, and amongst them the suppliant's; and that the claim has not been paid.

To the petition, which stated in substance what I have here stated, the Attorney General demurred, and the Court below upheld the demurrer. We think they were right, and upon two grounds.

First, the treaty of 1842, between Her Majesty and the Emperor of China, being an act of state, was referred to, both in the Court below and before us, to ascertain the exact words upon which the supposed obligation had arisen. The fifth article of that treaty, after providing for a certain amount of freedom of trade on the part of British merchants residing in China, proceeds

as follows: "And His Imperial Majesty further agrees to pay to the British government the sum of three millions of dollars on account of debts due to British subjects by some of the said Hong merchants, or Cohong, who have become insolvent, and who owe very large sums of money to subjects of Her Britannic Majesty." The sum is paid in gross, or in the rough, not as the ascertained total amount, but "on account of" debts due to British subjects by Chinese merchants, who are said to owe, not "three millions of dollars," nor "the said sum," but "very large sums of money," to British subjects. The money was paid to the British government, not for British subjects, but "on account of debts due to British subjects." It was paid as a lump sum in round figures. No specific sum was ever ascertained, either between the two governments, or between the British government and the suppliant, as the amount of the suppliant's claim, and it is plain that no such specific sum was ever considered between the Plenipotentiaries who negotiated the treaty. It is not, therefore, correct to say, as the suppliant does in his petition, that this money was ever paid to the Plenipotentiaries of the Queen "for the purpose of paying his claim;" it was never received for such a purpose; and upon the true construction of the language of the treaty, quite apart from higher and wider considerations, we think that the case of the suppliant must fail.

Secondly, upon these higher and wider considerations, as to which, in a case of this kind, we ought not to abstain from expressing an opinion, we think he fails also. We assent, upon full consideration, to the reasoning of the judges in the Court below. The making of peace and the making of war, as they are the undoubted, so they are, perhaps, the highest, acts of the prerogative of the Crown. The terms on which peace is made are in the absolute discretion of the Sovereign. If Captain Elliot did (to use the words of the petition) promise that the Queen would compel the Chinese government to pay these claims when terms of peace were arranged; if Sir Henry Pottinger did promise that these claims should be insisted on, and should be paid, they both exceeded their authority, and promised what they had no power to perform, or to pledge the Queen to perform. The Queen might or not, as she thought fit, have made peace at all; she might or not, as she

1876

RUSTOMJEE v. THE QUEEN.

thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts. It is a treaty between herself as sovereign, and the Emperor of China as sovereign, and though he might complain of the infraction, if infraction there were, of its provisions, her subjects cannot. We do not say that under no circumstances can the Crown be a trustee; we do not even say that under no circumstances can the Crown be an agent; but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever.

We do not, indeed, doubt that, on the payment of the money by the Emperor of China, there was a duty on the part of the English Sovereign to administer the money so received according to the stipulations of the treaty. But it was a duty to do justice to her subjects according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a cestui que trust. If there has been a failure to perform that duty, which we only suggest for the sake of argument, it is one which Parliament can and will correct: not one with which the Courts of Law can deal. It is indeed in the highest degree unlikely that there has been, or ever will be, such a failure. In this country, five-and-thirty years would not have run their course without the attention of Parliament being called to the unjust withholding of money by the English government from an English subject entitled to it. But, whether this is so or not, it is to Parliament alone that the suppliant can have recourse.

For these reasons, we are of opinion that this appeal must be dismissed, and the judgment of the Court below affirmed with costs.

Judgment affirmed.

Solicitor for suppliant: *A. G. Ditton.*

Solicitors for the Crown: *Raven & Hare, for the Solicitor to the Treasury.*

In re GOLDSWORTHY.

1876
Dec. 11.

Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 25, *subs.* 10—*Parent and Child—Right of Father to the Custody of his infant Children.*

Since the passing of the Judicature Act, 1873, the Courts of Common Law have concurrent jurisdiction with the Courts of Equity with regard to the care and custody of infants; but, in the exercise of that jurisdiction, the rules of Equity are to prevail.

Before, however, the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that he has so conducted himself, or placed himself in such a position, as to render it not merely better for the children but essential to their safety or welfare in some very serious and important respect that the father's acknowledged rights should be interfered with.

Mere incontinence, or habits of intemperance, will not of itself justify the interference of the Court.

The affidavits of the mother and others, in answer to a rule for a habeas corpus by a father to remove his child (a boy of nine years) from the custody of the child's maternal grandfather, disclosing facts which shewed the applicant to be a person of intemperate and vicious life, and in the habit of using gross and disgusting language as well as personal violence to his wife,—the Court declined to interfere, the present custody of the child being unobjectionable.

Bompas, on behalf of Alfred Goldsworthy, obtained a rule calling upon Abraham Bailey and Elizabeth Goldsworthy to shew cause why a writ of habeas corpus should not issue directed to them, commanding them to have before this Divisional Court immediately after the receipt of the said writ the body of Alfred Ernest Goldsworthy, together with the day and cause of his taking and detainer, &c.

The affidavit of the applicant, after stating his marriage and the birth of his son Alfred Ernest on the 18th of April, 1866, proceeded (so far as is material) thus:—

3. From the day of my marriage I have lived with my wife in Bristol, and have always kept a comfortable home and properly maintained my wife and allowed her a sufficient sum for obtaining proper articles of wearing apparel for herself and my son.

4. On the 7th of October last I left my home at about 8 o'clock in the morning, as is my usual custom, to attend to my business, and was then on good terms with my wife; and I did not return to my home until about 4 o'clock in the afternoon, and found that my wife and child had left my house, and they have not since returned.

5. From inquiries I made I ascertained that my wife left my house on the

1876

RE GOLDSWORTHY.

said 7th of October last at about 12 o'clock at noon with my child, in company with her father Abraham Bailey . . . and had gone to her father's, the said Abraham Bailey's, house at Staple Grove, near Taunton. Thereupon I got a friend to go down and endeavour to get my wife to return and bring our child back: but she refused to return, and she and her father refused to allow my son to leave them.

7. On the 25th of October I wrote a letter to my wife begging her to return and bring our child with her; and in reply I received a letter from her, refusing to return to me.

8. On Thursday, the 2nd of November instant, I went down to the house of Abraham Bailey, at Staple Grove, near Taunton, and saw him, and formally applied to him to give up my child to me, which he refused to do.

11. My son Alfred Ernest was placed by me at a boarding-school at Long Ashton, near Bristol, about eighteen months ago, and remained there about twelve months, when I was desirous of seeing more of him and having him more frequently with me, he being my only child. I removed him from that school and sent him to a day-school in the neighbourhood of my house, where he was up to the time he was taken away from my house.

12. I am desirous of having my son under my care and control, and I desire to send him to a boarding-school in the neighbourhood of Bristol, where he may be able to see me frequently.

13. There have been differences between me and my wife, which I mainly attribute to the influence and interference of her father. I have never done any act which can render me unworthy or unfit to have the care and custody of my son, of whom I am extremely fond, and in whose society I take great delight.

There was also an affidavit by one of the applicant's solicitors, as to formal matters.

Arthur Charles shewed cause upon affidavits by the wife and her father and four other persons. The wife deposed to the following effect:—

2. My husband has not always found a comfortable home for me and my son Alfred. My son was born on the 18th of April, 1866, and shortly after his birth my husband commenced a course of ill-treatment towards me which continued more or less down to the time I left his house on the 7th of October last. From the year 1866 down to the beginning of 1874 my husband has been in the habit of getting intoxicated and returning to his home in that state late at night, assaulting me and threatening my life, and making use of the most filthy and disgusting language to me.

3. From the year 1874 down to the present time the conduct of my husband has been much worse: he has frequently returned home late every night (Sundays excepted) for weeks together in a state of intoxication; and, in consequence of the excessive use of intoxicating liquors, he has on three or four occasions during that period suffered from incipient delirium tremens, and been attended therefor by Mr. Smart, a surgeon residing and practising in Bristol.

4. During the period aforesaid the conduct of my husband towards me has been one of continued cruelty and violence. His violence has consisted in striking

me with his fists, taking hold of me by the throat and trying to choke me, kicking me when in bed, and throwing things at me with considerable violence. He has also during the same period frequently threatened to murder me, and has got out of bed at night to get a pistol which he kept in a cupboard in the bedroom, and threatened to shoot me; and I have been obliged on several occasions to leave my bed-room undressed, to escape from his violence. He has on many occasions threatened to cut my throat, and put a bullet through me, and to take away my life in one way or another; and he has often said he should not mind swinging for me: in fact, for upwards of two years scarcely a day has ever passed without my husband being guilty of the conduct I have described.

5. In addition to the violence committed upon me, and the threats used by him, my husband has for the last two years and upwards used the most filthy and disgusting language towards me. He was constantly in the habit of calling me * * * and other filthy and disgusting names; and his language generally has been of a most filthy and disgusting character.

6. It is not true that my husband was on good terms with me on the 7th of October last; but, on the contrary, I say that two or three days before that day he came home at night the worse for liquor, and when he was taking his supper he threatened to kill me, and took up a knife and struck out at my throat with the blade thereof, and I only avoided the blow by moving back out of his way.

7. For some time after the said ill-treatment commenced I have remonstrated with my husband from time to time on his conduct, with a view of inducing him to discontinue the same; but for upwards of two years last past I have not done so, fearing that he might carry his threats into execution or do me some bodily injury.

8. I have done all in my power to prevent my son seeing the conduct of his father or hearing his language towards me; but it has been of such frequent occurrence that, since he was taken from the boarding-school at Long Ashton at Christmas last, he has seen the violence I complain of and frequently heard the threats and also the filthy names my husband has called me. I have done all in my power to prevent his hearing my husband's threats and language, by sending him out of the room when the said threats and language happened to be used.

9. My son has, from hearing the language of his father, contracted a habit of making use of similar expressions to the servant in our employ as my husband has called me, and which are referred to in the fifth paragraph of this my affidavit; and I am positive that he has learned these expressions by hearing them applied to me by my husband.

10. In consequence of the treatment of my husband my health has completely broken down, and I have had to consult Mr. Smart; and he has informed me that my illness was attributable entirely to the treatment I had received and the mental anguish I had suffered in consequence.

11. For the sake of my son I bore the treatment I have described until I had not strength to do so any longer; and I felt that, unless I left my husband, I should not live: and some time before I so left I told my son that I should be compelled to do so; and he begged me to take him with me, and not leave him behind with his father.

12. I deny that any differences have arisen between my husband and myself on account of the influence or interference of my father. I have from time to time complained to my father of my husband's treatment; but he has in no way

1876

RE GOLDSWORTHY.

interfered between us, beyond saying that if I could not live with my husband he would provide a home for me.

13. After I left my husband, and before the institution of these proceedings, I had caused my solicitors to be instructed to institute proceedings for a dissolution of the marriage between me and my husband, on the ground of adultery committed by him (and which he has himself admitted to me) and the cruelty I have herein described.

14. I believe that, if my son is placed in the custody of my husband, he will be ruined by the bad example of my husband.

15. My son is very delicate in health, and requires great care and attention, such as I am certain my husband would never bestow upon him.

Mr. Bailey made an affidavit denying that he had ever interfered or influenced his daughter, and admitting that he had refused to give up his grandchild to the applicant.

Mr. Smart, surgeon, deposed that on three occasions during the last three years Alfred Goldsworthy had suffered from attacks of incipient delirium tremens. He also deposed that Elizabeth Goldsworthy on several occasions during the last two years had suffered from extreme nervous debility, such as would be occasioned by fright, ill-treatment, or mental anguish.

Frederick Clarke, Bristol, made an affidavit as to Alfred Goldsworthy's habits of intemperance prior to November, 1872; also to an admission made by him prior to November, 1872, that he had been guilty of adultery.

Henry Withers, Bristol, made an affidavit as to Alfred Goldsworthy's habits since November, 1872, in the following terms:—

4. Since November, 1872, especially during the last two years, I have seen Goldsworthy almost daily (Sundays excepted), and frequently on several occasions during the same day, and he has very frequently when I have seen him during that period been more or less intoxicated and under the influence of liquor.

Henry William Charles deposed that for about two years since November, 1872, he had had opportunities of seeing Alfred Goldsworthy almost daily at his place of business; and that during that period Goldsworthy spent a considerable portion of his time in public-houses, drinking, and was very frequently in the day-time in a state of intoxication.

Affidavits were produced in reply sworn respectively by the applicant and by George Jeffery. The further affidavit of the applicant was (so far as is material) as follows:—

2. I have never been in the habit of returning home intoxicated. I have almost invariably returned straight home upon closing my place of business, except when

I attended meetings of the choir or other meetings at Hebron Chapel, or of the Liberal Committee, or other similar meetings. I have never been in the habit of frequenting public-houses.

3. I have never returned home in a state of intoxication for a week together every night except Sunday. I have seldom drunk anything except in my own house. I have never suffered from delirium tremens.

4. I admit that I am of an excitable temper, and that in consequence of the extremely aggravating conduct of my wife I have frequently lost my temper, and on such occasions I may have used violent language to her; but I deny that I ever seriously threatened her life or to do her any bodily harm.

5. I deny that my conduct towards my wife has been one of continued cruelty and violence; and I have never kicked her or tried to choke her. The only occasions on which I remember to have struck her are two,—once when she seized my beard, and I struck her with the back of my hand, to compel her to free me,—and once in order to compel her to desist when she scratched the side of my face with her nails; and I deny that I ever got out of bed to get a pistol, or that I ever struck at her with a knife so as to endanger her being cut with it.

6. The quarrels between myself and my wife have taken place almost entirely in the evening, after my son Alfred Ernest Goldsworthy had gone to bed; and I deny that my conduct has taught him to use bad language.

7. My conduct has been such as to obtain the respect of those with whom I associate, as is proved by, amongst other things, the fact that when during the last winter I resigned the position of treasurer to the choir at Hebron Chapel, which I had held during many years, they, without any solicitation, elected me an honorary member of the choir. I am also president of one of the divisions of the Liberal Association in Bodminster.

8. If Alfred Ernest Goldsworthy is restored to me, it is my intention to place him in a boarding-school near where I reside, and where my wife will always be at liberty to see him. I have always taken and shall continue to take all the care of him that his state of health or any other circumstances may require.

The affidavit of George Jeffery, of Bodminster, stated that

He was, and for many years had been, trustee of Portwall Lane Chapel, Bristol, and class-leader in that chapel, and Sunday-school teacher in the parish of Redcliff; that for twelve years and upwards he had known and been well acquainted with Alfred Goldsworthy, and had been on terms of intimacy with him and his family, and had often spent the evening at his house, and had seen him with his wife and his son Alfred Ernest Goldsworthy, and had remarked the great kindness with which Alfred Goldsworthy has treated his said son, and the evident affection which existed between him and his son; that Alfred Goldsworthy was in the habit of personally taking the child to and from his school, and had always in his presence shewn the greatest solicitude for his welfare and bringing up; that Alfred Goldsworthy had never in his presence spoken or acted in any manner unbecoming a parent towards his child; that he had never seen Alfred Goldsworthy conduct himself towards his wife in the violent manner described in the 4th paragraph of E. Goldsworthy's affidavit, or threaten violence towards her; but, on the contrary, had seen him treat her with kindness; that he had never heard Alfred Goldsworthy make use of the filthy language described, or of bad

1876

RE GOLDSWORTHY.

language; that, during the time he had known Alfred Goldsworthy, he had met him frequently, sometimes two or three times a week, returning from his work between 6 and 7 o'clock in the evening; and had never seen him out late at night, except when attending political or religious meetings.

The answer to this rule is, that the applicant is shewn by the affidavit of his wife,—which is corroborated by those of the other deponents, and which is substantially unanswered by the affidavits filed in reply,—to be a man of such grossly profligate and intemperate habits and conduct as to be utterly unfitted to be trusted with the custody of his child. Although this is a matter which was practically in the exclusive jurisdiction of the Court of Chancery, the Judicature Act, 1873, has extended that jurisdiction to the Courts of common law, with this proviso, that, in the exercise of it, the rules of equity are to prevail. Now, the rule in equity is thus stated in Story's Equity Jurisdiction, § 1341, 10th ed., 595: "Although, in general, parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But, whenever this presumption is removed, whenever, for example, it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children,—in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and to take care of them and to superintend their education." And numerous authorities are cited to support those propositions. The principle upon which the Courts of common law act in these cases is said in *Rex* v. *Greenhill* (1) to be, that a child will not be given into the father's custody if it appears that in his hands it will be exposed to cruelty or to gross corruption. Can it be doubted that the mind of the infant in question

(1) 4 Ad. & E. 624.

would be otherwise than exposed to contamination and corruption of the vilest description if taken from his present domicil and delivered over to the custody of a man who could be guilty of the conduct described in the affidavits? The present case is clearly brought within the principles laid down by Lord Eldon in *Wellesley* v. *Duke of Beaufort.* (1)

Bompas (*White, Q.C.*, with him), in support of the rule. There is nothing to justify the Court in this case in breaking through the ordinary rule by which the father is held to be primâ facie the proper guardian of his infant children, at least beyond the period of nurture. It is distinctly laid down in *Re Fynn* (2), that, before the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that he has so conducted himself or placed himself in such a position as to render it not merely better for the children, but essential to their safety or welfare, that the father's acknowledged rights should be interfered with. The same rule is laid down in *Re Curtis.* (3) Now, do the affidavits here, taking them all together, disclose such a state of things as to satisfy the Court that the conduct of this man *towards his child* has been such as to render it "essential to the child's safety or welfare," moral or physical, that the parental rights should be interfered with? There is no allegation of ill-treatment of the child; but a mere suggestion that his morals may be injured by the possibility of his seeing his father in an inebriate state or hearing him utter bad language. There is no affidavit by any member of the family, or of any intimate acquaintance (save that of Jeffery, whose testimony is strongly in the applicant's favour) shewing the inner lives of the parties. The maternal grandfather even, though he has made an affidavit in answer to this application, is wholly silent upon the subject. Besides, the proper custody of the child is a matter which may be more fitly and conveniently dealt with when the parties appear in the Divorce Court, where the evidence will be given vivâ voce, with the opportunity of cross-examination.

LORD COLERIDGE, C.J. In this case the Court is called upon to

(1) 2 Russ. 1. (2) 12 Jur. 713.
(3) 28 L. J. (Ch.) 458.

1876

RE GOLDSWORTHY.

exercise a jurisdiction over an infant which heretofore has been exercised by the Court of Chancery. But, since the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), that jurisdiction has been extended to the Courts of common law: and, not only does that Act, by s. 16, confer that jurisdiction upon us, but s. 25, subs. 10, declares in express terms that, "in questions relating to the custody and education of infants, the rules of Equity shall prevail." With regard to the doctrine of the Court of Chancery upon this subject, I may refer generally to the remarks of Lord Eldon in the case of *Wellesley* v. *Duke of Beaufort* (1), where, however, far greater misconduct was shewn than any deposed to in the affidavits now before us. And in the fuller report of the case to which Mr. Bompas referred, of *Ex parte Fynn* (2), I find some very striking observations by Sir J. Knight Bruce which are more immediately applicable to the present case. After saying that the Court always very reluctantly interferes with the rights of a parent with regard to the care and custody of his children, that very learned judge goes on to say (3): "The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and, in a sense, on condition of performing those duties: but there is a great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance; nor could a Court of justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be for their sakes and his own removed; he may be all this without rendering himself liable to judicial interference: and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them, it must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is placed

(1) 2 Russ. 1.

(2) 2 De G. & Sm. 457.

(3) At p. 474.

1876

RE GOLDSWORTHY.

in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that his rights should be treated as lost or suspended, should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong." In that case the Vice-Chancellor declined to interfere. He refused to make an order changing the custody of the children, not because the misconduct of the father was not such as would in his opinion have justified such a course, but because the person to whose care he was asked to assign the children did not shew sufficient grounds to satisfy the Court that she was of ability to maintain and educate them properly. I therefore come to the consideration of this case with a due sense of the responsibility which rests upon the Court in acting upon the principles thus enunciated. Now, it is not suggested here that the present custody of the child is inconvenient or improper in itself. The boy is under the care of his maternal grandfather. The father in his affidavit does not in the slightest degree question the propriety of that custody, either on the ground of the want of means or from any doubt as to the moral or physical training of his child. If, therefore, we were to interfere, we should be taking the child from the custody of one against whom there can be no objection whatever. Has, then, the father satisfied the Court that it can, without imperiling the safety or welfare of the child in some very serious and important respect, order him to be restored to the father's custody? I must say that it would have been more satisfactory to my mind if we had been furnished with fuller information, such as the testimony of neighbours and friends of the family. But, upon the best consideration I can give to the matter, I think the affidavits of the wife, her father, and Mr. Smart, the medical man, have not been answered by the very unsatisfactory affidavit of the husband. I do not place my decision on the ground of imputed immorality of the husband, using the word immorality in the sense attached to it by convention, which limits it to the relations between the sexes. It is manifest that, according to the principles by which this jurisdiction has always been exercised, there may be immorality of that sort which would not be held sufficient ground for depriving a father of the custody of his children.

1876

RE GOLDSWORTHY.

Nor do I put it upon the ground of gross and habitual intemperance alone. If that were indulged in privately, and were not associated with other conduct calculated to prejudice in an important degree the welfare of the child, I should not, as at present advised, be disposed to take him away from his father's custody. But I place my decision upon this ground; that it is made out to my satisfaction that there has been such gross and habitual intemperance, associated with the constant and habitual use of such improper and outrageous language, on the part of the father, as cannot but be seriously prejudicial to the moral safety and welfare of the child. Believing, therefore, as I do, that the elementary morals of the child are in serious danger from the gross and habitual intemperance of the father, coupled with the other conduct imputed to him by the mother, I am of opinion that the father has not made out a title to the custody or possession of his son, and that the rule should be discharged.

POLLOCK, B. The Court is upon this occasion called on to exercise that which has always been considered as a difficult and delicate jurisdiction, viz. to interfere with the father's natural right to the custody of his children: and it is not without some doubt and anxious consideration that I have come to the same conclusion that the Lord Chief Justice has arrived at. With regard to the facts, I must say that I should have been better satisfied if we had been furnished with further affidavits as to the general conduct of the applicant, and more especially as to his conduct towards the child. At the same time, we are bound to apply to this as to every other case our general experience of life, and to remember how difficult it is to obtain the testimony of friends or neighbours as to matters of this kind. I am also well aware how easy it is for a man to find persons ready to speak in his favor, when they can know nothing of his inner life. But, when we look at the bareness of the father's answer to the affidavits filed in opposition to his application,—especially at the extreme imperfection of his own answer,—I am led to the conclusion that we may fairly base our judgment upon the information we have before us. I must confess I felt somewhat pressed by the remark that another Court has by means of vivâ voce evidence a

1876

RE GOLDSWORTHY.

better opportunity of inquiring into a matter of this kind than this Court has. But the true answer to that is, that the issue in the Divorce Court is not the same, and that the inquiry into the proper custody of the children there is merely a collateral one: and I think we ought not to decline jurisdiction because a similar jurisdiction may be exercised by another tribunal. All we have to determine is whether the present case is brought within the rules and principles upon which Courts of Equity have been heretofore guided in cases of this kind. I think it is. It is the case of a man habitually indulging in inebriety and in the use of violence and language of a character the most abominable that can be conceived. Such conduct must of necessity seriously affect the interest and welfare of the child. For these reasons I think it is inexpedient that the present custody of the child should be interfered with.

Rule discharged, with costs.

Solicitors for applicant: *Guscotte, Wadham, & Daw, for O'Donoghue & Anson, Bristol.*

Solicitors for respondents: *Gregory, Rowcliffes, & Co., for Benson & Thomas, Bristol.*

[IN THE COURT OF APPEAL.]

Nov. 10.

ROBSON *v.* THE NORTH EASTERN RAILWAY COMPANY.

Railway Company—Negligence—Evidence—Station.

2 Q.B.D. 85. 252 2 C.P.D. 126.

A railway train drew up at a small station with the engine and part of one of the carriages beyond the platform. A passenger in that carriage, having parcels in her hands, opened the door and waited on the iron step some time for assistance; but, no one coming to assist, she, fearing that the train would move on, tried to alight by getting on to the footboard, and in so doing fell and injured herself, for which injury she brought an action against the company:—

Held, affirming the decision of the Court of Queen's Bench, that, under the circumstances, there was evidence of negligence which should have been left to the jury.

Per Mellish, L.J.: Railway companies are bound to find, at every station, reasonable means for passengers to alight.

Siner v. *Great Western Ry. Co.* (Law Rep. 4 Ex. 117) distinguished.

APPEAL from a decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the plaintiff, on the ground

1876

ROBSON v. NORTH EASTERN RAILWAY CO.

that there was evidence of negligence on the part of a railway company towards the plaintiff, a passenger, who had been injured in alighting from a carriage at a station, beyond the platform: Law Rep. 10 Q. B. 271, where the facts are fully stated.

Herschell, Q.C., and *Crompton*, for the defendants. The plaintiff was injured by getting out of the carriage beyond the platform; but the station was small, and it is impossible for companies to provide platforms at all such stations. The company are in no way bound to build platforms. On the continent there are none. There was one man at the station, who was quite enough for the ordinary service of the train, and the plaintiff might have called him. The company cannot have a porter for each passenger. Infirm people, or people with many parcels, must take some one to help them, or only stop at the principal stations. The company provide these small stations for the convenience of their passengers only. The utmost harm which could have happened to the plaintiff would have been that she would have been carried on, and then she might have recovered damages. If, instead of doing so, she chose to run the risk, she cannot recover more than that amount of damages: *Siner* v. *Great Western Ry. Co.* (1) was a stronger case than this, and has never been overruled. In *Bridges* v. *North London Ry. Co.* (2) there was clearly negligence; and the House of Lords did not there say that the question must always be left to the jury, who invariably find against the company.

Kay, Q.C., and *F. W. Gibbs*, for the plaintiff. There is no pretence for saying that this woman did not take every precaution: *Adams* v. *Lancashire and Yorkshire Ry. Co.* (3) is approved of in *Gee* v. *Metropolitan Ry. Co.* (4), and is a stronger case.

Crompton, in reply.

LORD COLERIDGE, C.J. We have to consider whether in this case the judgment of the Court of Queen's Bench, setting aside a nonsuit and entering a verdict for the plaintiff, is or is not correct.

Now, in these railway cases, it is always easy to cite other reported cases each decided upon special facts coming more or less close to the facts of the case before the Court. But, the question

(1) Law Rep. 3 Ex. 150; 4 Ex. 117.
(2) Law Rep. 7 H. L. 213.
(3) Law Rep. 4 C. P. 739.
(4) Law Rep. 8 Q. B. 161.

1876

ROBSON v. NORTH EASTERN RAILWAY CO.

whether there is or is not evidence to go to the jury, must in the vast majority of instances depend on the circumstances of the case. If two cases were identical, of course one must follow the other; but, in the nature of things, two such cases could hardly occur. No doubt there has been, I can hardly say a conflict, but a difference of opinion, between judges as to the liability of railway companies in cases of this description, some Courts and some judges having taken views in favour of the railway companies, and others having taken unfavourable views. It may be, and probably is, that the difference is for the present set at rest by the case of *Bridges* v. *North London Ry. Co.* (1), which, though the judgments of the Lord Chancellor and Lord Hatherley are confined to the particular circumstances, yet shews what was the opinion of the judges summoned to advise the House of Lords, and that the House of Lords was deciding in accordance with those opinions. It may be said that the view of the House of Lords is that in these cases, if there is any evidence at all, it is for the jury and not for the judge to say whether there was any negligence on the part of the company. This case, however, we have to decide upon its own facts. *Siner* v. *Great Western Ry. Co.* (2), which was pressed upon us as a direct authority, was decided in 1869, and has been commented on and distinguished in *Bridges* v. *North London Ry. Co.*, which came before the Exchequer Chamber (3), and then before the House of Lords. (1) *Siner's Case* (2) was in some respects like this case. There, also, the train drew up outside the station, which was not long enough. The passenger got out of the carriage where there was no platform, and in so doing sustained damage. The Courts both held that the circumstances so stated did not amount to evidence against the company; but in this case we have what was not in *Siner's Case* (2), an invitation to the passengers to alight; and the Court of Exchequer Chamber held, in *Cockle* v. *London and South Eastern Ry. Co.* (4), that in such a state of circumstances the passenger was justified in getting out, and there was evidence of negligence on the part of the company. The Lord Chief Justice there says (5): "The foregoing case appears to us in point

(1) Law Rep. 7 H. L. 213.
(2) Law Rep. 3 Ex. 150; 4 Ex. 117.
(3) Law Rep. 6 Q. B. 377.
(4) Law Rep. 7 C. P. 321.
(5) Law Rep. 7 C. P. at p. 326.

1876

ROBSON v. NORTH EASTERN RAILWAY CO.

to the present, as establishing that an invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. It is true that, in the case before us, there was not the invitation to alight which is implied in the opening of the carriage-door, as occurred in the case of *Praeger* v. *Bristol and Exeter Ry. Co.* (1) But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passengers alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at the particular station." It appears to me that the facts here are very distinctly within that case. In that case *Siner* v. *Great Western Ry. Co.* (2) was referred to and distinguished; we are therefore warranted by authority and by a sense of reason in saying that there was evidence of negligence which ought to have been left to the jury.

MELLISH, L.J. I am of the same opinion. It is clearly the law that railway companies are bound to find reasonable means for passengers to alight at every station at which they choose to stop. The plaintiff here was invited to alight, and the fact of the carriage being beyond the platform affords some evidence that she could not get out without assistance and exposing herself to some danger. Then comes the question whether she was bound to get out. It is proved as a fact that the platform was not long enough for the ordinary traffic; but if she had got out without looking for assistance then the facts would in my judgment have been the same as in *Siner's Case* (2), and I should have great difficulty in saying that the company was not entitled to assume that she had the ordinary knowledge of railway travelling and ought to have waited for assistance. The distinction here is, that she got on the step and waited to see whether assistance would come. One man was employed in taking out luggage so long that she supposed that as soon as the luggage was out the train would go on and she would be carried to the next station. That was not an unreason-

(1) Law Rep. 7 C. P. at pp. 323–326. (2) Law Rep. 3 Ex. 150; 4 Ex. 117.

able supposition, and there was something on which the jury might come to a conclusion against the defendants.

BRETT, J.A. It appears to me that the judgment of the House of Lords in *Bridges* v. *North London Ry. Co.* (1) puts an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for the passenger to do. The House of Lords held, that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide. *Siner* v. *Great Western Ry. Co.* (2) was decided in the heat of the controversy, and without saying that it ought to be overruled, I may say that it was decided by judges who thought that these cases ought to be left to the judge and not to the jury. The House of Lords has decided that they are to be left to the jury, and the judgment of the Queen's Bench in this case is put upon this ground, that the passenger did remain so long that she might reasonably suppose that if she did not get down she would be carried on, and unless there was danger to her life she was justified in getting down. The jury were entitled to say whether on such facts there was negligence on the part of the company.

AMPHLETT, J.A. I am of the same opinion.

Judgment affirmed. (3)

Solicitor for plaintiff: *Brownlow.*

Solicitors for defendants: *Williamson, Hill, & Co., for Richardson, Gutch, & Co., York.*

(1) Law Rep. 7 H. L. 213. (2) Law Rep. 3 Ex. 150; 4 Ex. 117.
(3) See *Rose* v. *North Eastern Ry. Co.* (2 Ex. D. 248.)

1876
Nov. 11, 13.

[CROWN CASE RESERVED.]

THE QUEEN *v.* KEYN.

Jurisdiction — Central Criminal Court — Admiralty — Territorial Waters — Offence within Three Miles of English Coast—Manslaughter—15 *Ric.* 2, *c.* 3—28 *Hen.* 8, *c.* 15—39 *Geo.* 3, *c.* 37—4 *&* 5 *Wm.* 4, *c.* 36, *s.* 22—7 *&* 8 *Vict. c.* 2.

Aff Cas 391

The prisoner was indicted at the Central Criminal Court for manslaughter. He was a foreigner and in command of a foreign ship, passing within three miles of the shore of England on a voyage to a foreign port; and whilst within that distance his ship ran into a British ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law:—

Held, by the majority of the Court (Cockburn, C.J., Kelly, C.B., Bramwell, J.A., Lush and Field, JJ., Sir R. Phillimore, and Pollock, B.; Lord Coleridge, C.J., Brett and Amphlett, JJ.A., Grove, Denman, and Lindley, JJ., dissenting), that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged.

By the whole of the majority of the Court, on the ground that, prior to 28 Hen. 8, c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England; that that and the subsequent statutes only transferred to the Common Law Courts and the Central Criminal Court the jurisdiction formerly possessed by the admiral; and that, therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try such an offence.

By Kelly, C.B., and Sir R. Phillimore, also, on the ground that, by the principles of international law, the power of a nation over the sea within three miles of its coasts is only for certain limited purposes; and that Parliament could not, consistently with those principles, apply English criminal law within those limits.

Held, contrà, by Lord Coleridge, C.J., Brett and Amphlett, JJ.A., Grove, Denman, and Lindley, JJ., on the ground that the sea within three miles of the coast of England is part of the territory of England; that the English criminal law extends over those limits; and the admiral formerly had, and the Central Criminal Court now has, jurisdiction to try offences there committed, although on board foreign ships.

By Lord Coleridge, C.J., and Denman, J., on the ground that the prisoner's ship having run into a British ship and sunk it, and so caused the death of a passenger on board the latter ship, the offence was committed on board a British ship, and, therefore, the Central Criminal Court had jurisdiction.

[For the full Report of this Case see 2 Ex. D. 63.]

ROBINSON *v.* PRICE AND OTHERS. 1876 Nov. 21.

Ship and Shipping—General Average—Imminent Peril—Auxiliary Steam Pumping Power—Spars and Cargo burnt as Fuel.

A ship sailed from Q. to L. being well equipped and manned for the voyage; she was fitted with a donkey-engine, and had on board a reasonable supply of coals to work it in pumping. The defendants were owners and consignees of a portion of the cargo. During the voyage the vessel met with very bad weather, and in order to avert the loss of the ship and her cargo, the master worked the pumps with the donkey-engine, and the supply of coals failing, he burnt as fuel for the donkey-engine the ship's spare spars and some of the cargo:—

Held, that the defendants were liable to a general average contribution in respect of the spars and the cargo burnt as fuel for the donkey-engine.

Semble, that if when the vessel sailed she had not had on board a reasonable supply of coals for the donkey-engine for pumping purposes during the voyage, the defendants would not have been liable to contribute to general average; for by fitting the vessel with a donkey-engine her owner impliedly represented to the defendants that the master would be supplied with the means of using it in time of peril, and this was a representation which he was bound to fulfil.

Affirmed on appeal post 295. C.A.

ACTION for general average. It was agreed by the parties that the action should depend upon the opinion of the Court upon the following special case:—

1. The plaintiff was the owner of the ship *John Baring*.

2. The defendants were merchants, and were the owners and consignees of a portion of the cargo hereinafter mentioned.

3. The *John Baring* was a ship of 547 tons registered tonnage. Her ordinary crew was 12 hands all told. On the 19th of August, 1873, she sailed from Quebec for London with a cargo of timber and a crew of 13 hands all told.

4. The *John Baring* then was and for two and a half years previously had been furnished with a donkey-engine, adapted for the loading and discharge of cargo and ballast, and also for pumping the vessel as hereinafter mentioned. She had ordinary ship's pumps fitted with a fly wheel, to be worked by hand in the ordinary way, or, if necessary, they could be connected with the donkey-engine by means of the wheel and of a chain messenger which was provided on board for that purpose, and so could be worked by the donkey-engine.

5. It was in 1876 a common practice for vessels in the timber

1876

ROBINSON v. PRICE.

trade to carry donkey-engines. In August, 1873, it was not the common practice to fit such vessels with donkey-engines, though it was not unfrequently done.

6. At the time of sailing the ship had five tons of coal on board, which was a sufficient supply of fuel for all purposes of the ship while at sea (other than pumping) for a much longer voyage than that from Quebec to London.

7. From the 1st to the 11th of September the ship encountered very heavy weather, and strained a good deal, and was pumped frequently. On the morning of the 11th the ship, making a very heavy plunge, sprang a leak; and although the pumps were diligently attended to, the water on the morning of the 12th was found to be gaining. During the night of the 12th, the watch was kept constantly at the pumps, and at 7 a.m. on the 13th, the weather still being very bad, the crew being worn out with pumping, and the water still gaining, the master connected the donkey-engine with the pumps, and so worked the pumps by means of the donkey-engine. The pumps were constantly going by steam during the 13th and 14th, the weather all the time being bad, and all efforts being scarcely sufficient to keep the ship free.

8. On the 14th, there being no prospect of stopping the leak, or of getting the ship into a place of safety for some time, and it being impossible to keep her afloat without having the pumps worked by the donkey-engine, the master, seeing that the supply of coals on board would, under the circumstances, be insufficient, used some of the ship's spare spars and a portion of the cargo, together with coals, to keep up the fire of the donkey-engine in order to keep the pumps going. On the 15th, 16th, and 17th of September the ship encountered very severe weather, and laboured heavily all the time, and it was only by keeping the pumps going constantly by steam that the leak could be kept under, and for this purpose, all the spare spars having been used up, further portions of the cargo were necessarily used for fuel. On the 18th of September the leak seemed to be gaining on the pumps, but by means of great efforts on the part of the master and crew of the ship she was kept afloat until the 20th of September, when she fell in with a steamship, and procured from her a supply of coals sufficient to keep the donkey-engine working,

until on the following day, the 21st, the ship was safely docked in the Thames.

9. The course and measures adopted by the master, under the above circumstances, were proper and necessary for the preservation of the ship and cargo. If he had not burned the spars and part of the cargo, the vessel and the remainder of the cargo would in all probability have been lost.

10. The ship was sufficiently equipped and manned for the voyage, according to the ordinary practice in equipping and manning such vessels for such a voyage, and but for the leak she would have had sufficient pumping power on board without using the donkey-engine. As it was, she had not (without using the donkey-engine) sufficient pumping power to deal with the water which she actually made, and she had not on board enough coal or enough fuel, or other materials belonging to the ship, to enable her to use the donkey-engine to the extent to which it became in fact necessary to use it.

The questions for the opinion of the Court were (1.) whether the loss incurred by the burning of the ship's spare spars was a general average loss; and (2.) whether the loss incurred by the burning of portions of the cargo under the circumstances stated was a general average loss.

Nov. 7. *Cohen, Q.C.* (*G. Bruce* with him) for the plaintiff. Upon the facts stated, the plaintiff as ship-owner suffered a general average loss, in respect of which he is entitled to receive contribution from the defendants as owners of part of the cargo. The peril was imminent and urgent, for, according to the ninth paragraph, if the spars and part of the cargo had not been burnt as fuel, the whole adventure would in all probability have been lost. The principle to be applied is the same as if the spars had been used to form a temporary rudder in place of one broken during a storm. The present case is similar to that of a master hiring extra hands to pump when his crew are unable to keep the vessel afloat; and this is plainly a general average loss: *Wilson* v. *Bank of Victoria.* (1) Nothing opposed to the contention for the plaintiff is to be found in *Harrison* v. *Bank of*

(1) Law Rep. 2 Q. B. 203, at p. 213.

1876

ROBINSON v. PRICE.

Australasia (1); for the question really in dispute in that case was whether the peril was urgent. It is only necessary to refer to the following authorities to shew that all the incidents of general average exist in the present case: 2 Arnould on Marine Insurance, 4th ed., part 3, ch. 4, p. 773; 2 Phillips on Insurance, 5th ed. ch. 15, s. 2, p. 78, par. 1299; Benecke on Marine Insurance, p. 171; *Birkley* v. *Presgrave* (2); *Plummer* v. *Wildman* (3); *Johnson* v. *Chapman* (4); *Stewart* v. *West India and Pacific Steamship Co.* (5)

French (*Benjamin, Q.C.*, with him) for the defendants. By putting a donkey-engine on board the *John Baring*, the plaintiff impliedly contracted that it should be used in time of danger; he in effect represented to the shippers of cargo at Quebec that she was better equipped than other vessels to encounter the perils of the voyage: he was therefore bound to provide sufficient fuel to keep the donkey-engine working until the arrival of the vessel at her port of destination; it was, in fact, part of her, and a short supply of coal was tantamount to a want of proper tackle. Moreover, in all probability, the captain, when he took on board the spars, calculated on being able to use them as fuel in time of peril; and the *John Baring* was safe so long as the donkey-engine was at work; there was, therefore, no such emergency as is necessary to maintain a claim for general average: 2 Phillips on Insurance, 5th ed. par. 1270. To allow the plaintiff to recover would be to allow him to take advantage of his own default.

Cohen, Q.C., replied.

Cur. adv. vult.

Nov. 21. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. The circumstances under which the ship's spars and the cargo were used as fuel for the donkey-engine satisfy all the conditions of a general average claim. The peril was imminent; the sacrifice voluntary, in the sense of being an act of will on the part of the master; it was, in the emergency, necessary in order to

(1) Law Rep. 7 Ex. 39.
(2) 1 East, 220
(3) 3 M. & S. 482.
(4) 19 C. B. (N.S.) 563; 35 L. J. (C.P.) 23.
(5) Law Rep. 8 Q. B. 88; in Ex. Ch. Law Rep. 8 Q. B. 362.

1876

ROBINSON v. PRICE.

save the ship from sinking, and was of course made with a view to the safety of the whole adventure—ship, freight, and cargo.

Primâ facie, therefore, the case of the plaintiff is made out. But it was objected that, as the ship was furnished with a donkey-engine, adapted and intended, in case of need, for pumping as well as for loading and discharging the cargo, the owner was bound to provide sufficient fuel for its use; that if this had been done the resort to the spars and cargo would not have been required; that it was not done, and therefore the use of the spars and cargo was not a necessity brought about by the perils of the sea, but a necessity occasioned by his own default.

Although we cannot accede to the proposition in its terms, we entirely accede to the principle which underlies it. We think that a shipper of cargo is entitled in time of peril to the benefit not only of the best services of the crew, in order to save his goods, but of the use of all the appliances for that purpose with which the ship is provided. It follows that where a ship is fitted up with auxiliary steam pumping power, it is the duty of the owner to make some provision for supplying the engine with fuel. Not that he is bound to have on board enough for every possible emergency, but he is bound to have a reasonable supply, having regard to the nature of the voyage, the season of the year, the quality of the cargo, the condition of the ship, and what experience has shewn to be prudent to provide against under those conditions. If he fails to do so, he cannot call upon the owners of cargo to contribute towards that reasonable supply. That would be to make them pay for that which he ought to have provided at his own expense. If, under such circumstances, the opportunity occurs during a time of peril of buying coals from a passing steamer, we think it clear that he could not charge their cost as an extraordinary expenditure entitling him to general average.

That statement of the case not being so explicit as it might have been upon this point, we thought it right to send it back to the learned counsel who settled it between the parties, to find from the evidence he had taken one way or the other upon this question. He has returned it to us, with a statement as follows: "I find that the *John Baring*, when she left Quebec, had on board a reasonable supply of coal for the donkey-engine for pumping purposes." This

1876

ROBINSON v. PRICE.

finding concludes the defendants. The primâ facie claim to general average contribution is not displaced by any default on the part of the owner, and our judgment must be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *H. C. Coote, for Tinley, Adamson, & Adamson, North Shields.*

Solicitors for defendants: *Argles & Rawlins.*

1877
Jan. 22.

[IN THE COURT OF APPEAL.]

LINDSAY AND OTHERS *v.* CUNDY AND OTHERS.

*Contract obtained by Fraud—Passing of Property—Conviction of Buyer for obtaining Goods under False Pretences—Restitution of Property—*24 & 25 *Vict. c.* 96, *s.* 100.

A. Blenkarn took premises at 37, Wood Street, and wrote to the plaintiffs at Belfast ordering goods of them. The letters were dated 37, Wood Street, and signed "A. Blenkarn & Co." in such a way as to look like "A. Blenkiron & Co.," there being an old-established firm of Blenkiron & Sons at 123, Wood Street. One of the plaintiffs knew something of that firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing them to "A. Blenkiron & Co., 37, Wood Street." The fraud having been discovered, Blenkarn was indicted and convicted for obtaining goods by falsely pretending that he was Blenkiron & Sons. Before the conviction the defendants had purchased some of the goods bonâ fide of Blenkarn without notice of the fraud, and re-sold them to other persons. The plaintiffs having brought an action for the conversion of the goods:—

Held, reversing the decision of the Queen's Bench Division, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn; that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action.

Hardman v. *Booth* (1 H. & C. 803; 32 L. J. (Ex.) 105) followed.

Appeal by Pltffs 1 Exch Ca 659

APPEAL from the judgment of the Queen's Bench Division in favour of the defendants. (1)

The facts are fully stated in the judgment of the Court of Appeal.

1876. Dec. 2. *Wills, Q.C.*, and *Thesiger, Q.C.*, for the plaintiffs. There are two questions in this case, first, whether the property

(1) 1 Q. B. D. 348.

1877

LINDSAY v. CUNDY.

passed out of the plaintiffs at all; and, secondly, if it did, whether, on the conviction of Blenkarn, the property did not revest in the plaintiffs, so that they may recover the goods or the proceeds from the defendants. On the first point, the property never passed out of the plaintiffs. If the false pretences by which a man obtains goods are of such a nature that they do not affect the question with what person the owner of the goods is dealing, a voidable contract is created, and the property in the goods passes out of the owner to the person who obtains them, until the owner has avoided the contract. But if the owner is deceived as to the person with whom he is dealing, and supposes that he is some one else—where the person who obtains the goods passes himself as another, or as the agent of another, for whom he professes to buy, in that case no property passes out of the owner. In the present case the plaintiffs thought they were dealing with Blenkiron & Sons, and gave credit to them, and not to the person who wrote to them, although he lived in the same street. This must be taken to be the fact, for the jury who convicted Blenkarn did so on the ground that he falsely pretended to be Blenkiron & Sons. *Hardman* v. *Booth* (1) is directly in point.

As to the second point, even if the property passed to Blenkarn, the plaintiffs, under 24 & 25 Vict. c. 96, are entitled to recover the goods or proceeds of them from the defendants, who purchased them from Blenkarn. The 100th section provides that where a person shall be convicted of (among other things) obtaining property under false pretences, on the prosecution of the owner "the property shall be restored to the owner." And by s. 1 the word "property" comprises "not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." It was decided in *Nickling* v. *Heaps* (2) that where goods have been obtained by false pretences, on conviction there is a relation back to the time of the original fraud. Therefore, on conviction the goods revested in the plaintiffs, and if the goods were now in the hands of the defendants they could recover them in specie, and as the

(1) 1 H. & C. 803; 32 L. J. (Ex.) 105.

(2) 21 L. T. (N.S.) 754.

1877

LINDSAY v. CUNDY.

goods have been sold they can recover the proceeds of them: *Fowler* v. *Hollins*. (1) *Horwood* v. *Smith* (2) was decided under the old statute of 21 Hen. 8, c. 11, which was expressed in different terms; and that case is, therefore, not applicable to the present.

Sir H. Giffard, S.G., and *B. Francis Williams*, for the defendants, were desired to confine their arguments to the first point.

The defendants do not dissent from the law as laid down in *Hardman* v. *Booth* (3), but the conclusion of fact drawn from the findings in this case renders that authority inapplicable. The distinction between larceny and false pretences must be borne in mind. In the case of larceny, neither the right of possession nor property passes out of the owner. In the case of false pretences, the property passes until the transaction is avoided. The real question is, whether there was a contract between the parties; if there was, whether voidable or not, the property passed to Blenkarn. Here there was a contract: there was an intended buyer and an intended seller. The plaintiffs intended to sell to the person who was corresponding with them, and who lived at 37, Wood Street; and they sent the goods to 37, Wood Street accordingly. The fact that they were deceived into supposing that Blenkarn was a member of an old-established firm with which they were acquainted, did not prevent it from being a contract: *Clough* v. *London and North Western Ry. Co.* (4)

Wills, Q.C., in reply.

Cur. adv. vult.

1877. Jan. 22. The judgment of the Court (Mellish, L.J., and Brett and Amphlett, JJ.A.) was delivered by

MELLISH, L.J. This was an appeal from a judgment of the Queen's Bench Division ordering judgment to be entered for the defendants on a motion for judgment.

The action was brought by Messrs. Roberts, Lindsay, & Co., who are linen manufacturers at Belfast, against Messrs. Cundy for the conversion of 250 dozen handkerchiefs. At the trial before Mr. Justice Blackburn it appeared that one Alfred Blenkarn, in

(1) Law Rep. 7 Q. B. 616.
(2) 2 T. R. 750.
(3) 1 H. & C. 803; 32 L. J. (Ex.) 105.
(4) Law Rep. 7 Ex. 26.

1873, hired a third floor at No. 37, Wood Street, and 5, Little Love Lane, Cheapside. There was a well-known firm of William Blenkiron & Sons, which had for many years carried on business at No. 123, Wood Street. Blenkarn wrote letters at the end of 1873 to the plaintiffs; by the first proposing to order, and by the others ordering, a large quantity of handkerchiefs from the plaintiffs. Those letters had a printed heading, "37, Wood Street, Cheapside, London; entrance, second door in Little Love Lane," and were signed "A. Blenkarn & Co.," written in such a way that it was evidently intended to be read "A. Blenkiron & Co." One of the plaintiffs had known the firm of Blenkiron and Sons several years before, and knew they were respectable. The plaintiffs wrote several letters addressed to "Messrs. Blenkiron & Co., 37, Wood Street," and they forwarded several lots of handkerchiefs to the same address, heading the invoices, "Messrs. Blenkiron and Co., London."

The fraud was afterwards discovered, and Blenkarn was, in April, 1874, convicted of obtaining the goods by the false pretence of being Blenkiron & Sons.

In the meantime the defendants had bought of Blenkarn 250 dozen cambric handkerchiefs, and had re-sold them all to different persons before the fraud of Blenkarn was discovered. The jury found that the defendants were bonâ fide purchasers of the handkerchiefs, and that they were part of the handkerchiefs sold by the plaintiffs to Blenkarn. The learned judge reserved the question for the Court, whether on the facts and findings the action was maintainable. The Queen's Bench Division held that the action could not be maintained, upon the ground that there was a sale of the handkerchiefs by the plaintiffs to Blenkarn, which could not be set aside as against the defendants, who were bonâ fide purchasers from Blenkarn without notice of his fraud, and that the case was not within 24 & 25 Vict. c. 96, s. 100.

In giving judgment Mr. Justice Blackburn says, "The first question that arises is one of fact, were these goods, which were originally the property of the plaintiffs, Messrs. Lindsay & Co., obtained from them by fraud, so that the property passed from them under a contract, though a contract under

1877

LINDSAY v. CUNDY.

certain circumstances liable to be avoided; or did the property never pass from the plaintiffs at all? Upon that question reliance was placed on the case of *Hardman* v. *Booth* (1), and that case unquestionably lays down very good law. The question for us is whether the facts are the same, and whether we ought to draw the same inference from the facts that the Court of Exchequer did in *Hardman* v. *Booth*. (1) That case lays down the law, that where a person has sold goods to A. B., or has been led to believe he has sold them to A. B., and delivered them as he supposes to A. B., and the person who had led him into that belief receives and carries off the goods, and disposes of them to another—there has not been a selling to the person who fraudulently represents himself to be a servant or agent of the supposed purchaser, A. B., and he cannot confer a good title on any one else, the property never having vested in him." We entirely agree with this statement of the law, but we cannot agree with the conclusion which the Court below has drawn from the facts. The true result of the facts seems to us to be that Blenkarn falsely pretended that the firm writing the letters and ordering the goods was the well-known firm of Blenkiron & Sons, and that the plaintiffs believing this pretence to be true, and that they were delivering the goods to the well-known firm of Blenkiron & Sons, delivered them to Blenkarn; and if this is a correct description of the facts the case is brought directly within the rule established by *Hardman* v. *Booth*. (1) Now, in the first place, the jury who convicted Blenkarn of obtaining goods by false pretences must have taken this view of the facts. They must have found both that Blenkarn falsely pretended that Blenkiron & Sons were the firm giving the orders, and that the plaintiffs delivered the handkerchiefs to him believing he was Blenkiron. If the jury had thought that the plaintiffs had intended to deliver the goods to the persons who carried on business at 37, Wood Street, whether they were the well-known firm of Blenkiron & Sons or not, they surely ought not to have convicted Blenkarn. Unless the plaintiffs intended to deliver the goods to the well-known firm of Blenkiron & Sons, they were not deceived by the false pretence, and if they did intend to

(1) 1 H. & C. 803; 32 L. J. (Ex.) 105.

deliver the goods to the well-known firm of Blenkiron & Sons there was no sale by them to Blenkarn.

It may not be unimportant to observe that the resemblance between the words "Blenkarn" and "Blenkiron" is wholly immaterial. If the signatures to the orders were intended by the writer to be read "Blenkiron," and were read "Blenkiron," they must be read "Blenkiron" for the purpose of determining the question with whom, if with any one, the plaintiffs contracted, and it cannot matter what was the real name of the man who fraudulently signed the letters in the name of "Blenkiron." The Court below admit that Blenkarn was properly convicted of obtaining the goods by false pretences, but at the same time came to the conclusion that there was a valid sale by the plaintiffs to him. This seems to us to involve a contradiction, because, the false pretence being that the firm giving the order were the well-known firm of "Blenkiron & Sons," it is impossible that he could have obtained the goods by that false pretence, and at the same time be the purchaser of them. He does not by fraud induce the plaintiffs to sell goods to him, but by fraudulently pretending that different persons are giving the orders from the person who really is giving them, he induces the plaintiffs to deliver the goods to him under the belief that they are selling them to the persons whose name he had assumed. Their whole question really is, whom did the plaintiffs mean to describe by "Blenkiron & Co., London," in their invoices? Their case is that they meant to describe the well-known firm of "Blenkiron," though they did not know the precise style of that firm, nor the number in Wood Street at which that firm carried on their business. The jury who convicted Blenkarn must have believed that the plaintiffs intended to sell to the well-known firm of Blenkiron & Sons. The jury in the present case were not asked to whom the plaintiffs intended to sell the handkerchiefs, but it was admitted that Blenkarn had obtained the handkerchiefs by false pretences, and having regard to the nature of the false pretences, we think it necessarily follows that the property in the handkerchiefs never passed from the plaintiffs, and that the plaintiffs are entitled to recover their value from the defendants.

The judgment for the defendants must be reversed, and judg-

1877

LINDSAY v. CUNDY.

ment entered for the plaintiffs for the value of the handkerchiefs, with costs both in the court below and here.

Judgment reversed, and entered for the plaintiffs.

Solicitors for plaintiffs: *Ashurst, Morris, & Co.*
Solicitor for defendants: *C. O. Humphreys.*

Jan. 22.

[IN THE COURT OF APPEAL.]

RANDALL *v.* NEWSON.

Sale of Chattel for specific Purpose—Warranty by Vendor of Fitness for Purpose—No exception as to latent Defect—Measure of Damages.

Post 457, 6 QBD 687

On the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects.

The limitation as to latent defects introduced by *Readhead* v. *Midland Ry. Co.* (Law Rep. 4 Q. B. 379) does not apply to the sale of a chattel.

The plaintiff ordered and bought of the defendant, a coach builder, a pole for the plaintiff's carriage. The pole broke in use and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence:—

Held, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole.

STATEMENT OF CLAIM, that plaintiff bought of defendant, a carriage manufacturer, a phaeton for two horses, the pole made and supplied for which was so carelessly and negligently made, and of such bad and improper wood, that while the plaintiff was driving the phaeton the pole broke and caused the horses to run away, and the horses were damaged.

Defence, denying that the pole was carelessly or negligently made, or of bad or improper wood; and not admitting that the pole broke by reason of any defect in the wood, or that the defendant sold the phaeton under such circumstances as to render him liable for the consequences of a latent defect. Issue joined.

At the trial before Archibald, J., at the Middlesex Hilary sittings, 1876, it appeared that the plaintiff bought of the defendant,

1877

RANDALL v. NEWSON.

who was a carriage builder, a phaeton, in August, 1874; it was only fitted with shafts for one horse, and the plaintiff gave orders to the defendant for a pole and splinter-bar to be made and fitted to it.

The phaeton was sent home with the pole and splinter-bar, and while the plaintiff was driving it with two horses in October, 1875, the horses swerved and the pole broke short off at the carriage. The horses in consequence became restive and were much damaged.

There was much contradictory evidence as to the cause of the breaking of the pole, the plaintiff's witnesses saying it was of bad wood, while the defendant's stated that the wood was perfectly good. The value of a new pole was agreed at 3*l.*, and the plaintiff gave evidence that his horses were damaged to between 130*l.* and 140*l.* The learned judge expressed it as his opinion, that if there were no negligence on the part of the defendant in making the pole, or in the selection of the materials, the plaintiff could not recover more than the 3*l.*; and he left to the jury two questions: 1. Was the pole reasonably fit and proper for the carriage? 2. Was the defendant guilty of any negligence? And he asked the jury also to assess the consequential damages, in case they should become material. The learned judge was obliged to leave the court, to attend a meeting of the judges, before the jury had returned their verdict.

The jury answered both questions in the negative, and as to the damages, said they understood from the judge that 3*l.* was all they could find.

On these findings, the verdict and judgment were entered for the plaintiff for 3*l.*, with leave to move to enter judgment for the defendant.

The defendant gave notice of motion accordingly; and the plaintiff obtained an order for a new trial on the ground of misdirection by the learned judge as to the measure of damages.

1876. Feb. 19. *Sills* (*Cave, Q.C.*, with him), for the defendant. *Gates, Q.C.*, and *Edward Pollock*, for the plaintiff.

THE COURT (Blackburn and Lush, JJ.) ordered judgment to be

1877

RANDALL v. NEWSON.

entered for the defendant, on the ground that the answers of the jury amounted to a finding of a latent defect in the wood of the pole, which no care nor skill could discover, and that the principle of the decision in *Readhead* v. *Midland Ry. Co.* (1) extended to the sale of an article for a specific purpose.

The plaintiff appealed.

Nov. 17. *Gates, Q.C.*, and *R. V. Williams* (*Edward Pollock* with him), for the plaintiff, contended that the decision in *Readhead* v. *Midland Ry. Co.* (1) did not extend to the sale of a chattel for a specific purpose, and that the language of the judges expressly confined the decision to the case then before the Court. They cited several of the cases which are reviewed in the judgment of the Court; they also referred to the French Code Civil, § 1641, and the Code of New York, § 884; and to *Sutton* v. *Temple* (2), and *Mody* v. *Gregson*. (3) And as to the damages, they cited *Smith* v. *Green* (4) and contended that the new trial ought to be confined to the question of damages.

Nov. 18. *Cave, Q.C.*, and *Sills*, for the defendant, contended that the general rule as to warranty on the sale of a chattel for a specific purpose had been modified by the decision in *Readhead* v. *Midland Ry. Co.* (1), and that this was still further shewn by *Francis* v. *Cockrell* (5), particularly by the judgment of Kelly, C.B. In addition to the cases noticed by the Court they cited *Bluett* v. *Osborne*. (6) As to the damages, they admitted that the plaintiff, if entitled to recover at all, was entitled to larger damages than the 3*l.*, on the principle of *Randall* v. *Raper* (7); but they contended that there ought to be a new trial generally, and not confined to the damages only.

Gates, Q.C., in reply, referred to Benjamin on Sale, 2nd ed. p. 543, as shewing that the profession did not consider the decision in *Readhead* v. *Midland Ry. Co.* (1), to have altered the law of warranty on the sale of a chattel for a specific purpose.

Cur. adv. vult.

(1) Law Rep. 4 Q. B. 379.
(2) 12 M. & W. 52.
(3) Law Rep. 4 Ex. 49.
(4) 1 C. P. D. 92.
(5) Law Rep. 5 Q. B. 501, 503.
(6) 1 Stark. 384.
(7) E. B. & E. 84; 27 L. J. (Q.B.) 266.

1877. Jan. 22. The judgment of the Court (Kelly, C.B., Mellish, L.J., and Brett and Amphlett, JJ.A.) was delivered by

1877

RANDALL v. NEWSON.

BRETT, J.A. This case was tried upon the footing that it was an action brought against the defendant, a coachbuilder, to recover damages in respect of injuries to the plaintiff's horses and carriage, by reason of the defendant having supplied to the plaintiff a defective carriage pole. The jury found that the pole was not reasonably fit and proper for the use of the carriage; but that there was no negligence on the part of the defendant (including, of course, his servants or agents) in supplying the pole. The price of a new pole was 3*l.* The damage done to the horses and carriage was much more. But the only damages found by the jury were 3*l.* Upon these findings the Court of Queen's Bench, applying to this contract the principle laid down in *Readhead* v. *Midland Ry. Co.* (1), gave judgment for the defendant. No dispute was made at the trial, or in argument, as to the nature of the order given and accepted; the questions argued were whether the defendant was liable at all, and what was the extent of damages to which he might be subjected, if he was liable at all. Now as to these questions, it is to be taken, although nothing specific seems to have been said, that the order given and accepted was not merely for a pole in general, but for the supply of a pole for the plaintiff's carriage; and that the contract therefore was for the purchase and sale, or supply, of an article for a specific purpose. In other words, the subject-matter of the contract was not merely a pole, but a pole for the purchaser's carriage; or, to state the proposition in an equivalent form, the thing, which would, if the contract were formally drawn up, be described in it as the subject-matter of it, would not be merely a pole generally, but a pole to be purchased for a specific purpose, namely to be used in the plaintiff's carriage. The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?

In order to decide this question it seems advisable to ascertain

(1) Law Rep. 2 Q. B. 412; in error 4 Q. B. 379.

1877

RANDALL v. NEWSON.

the primary or governing principle on which the earlier cases were decided, and to see whether the principle on which they were decided ought to be modified by the decision in *Readhead* v. *Midland Ry. Co.* (1) The earliest case seems to be *Parkinson* v. *Lee* (2), in 1802. It is sufficient to say of it that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled. Neither can the case of *Fisher* v. *Samuda* (3), in 1808, be said to decide anything. The first cases of importance are *Gardiner* v. *Gray* (4), and *Laing* v. *Fidgeon*, (5), in 1815. In *Gardiner* v. *Gray* (4) the contract was for the purchase and sale of "waste silk." The silk was imported, and the bulk had not been seen either by the defendant, the seller, or the plaintiff, the buyer. Lord Ellenborough, said: "I am of opinion that, under such circumstances" (i. e. a sale of silk as waste silk) "the purchaser has a right to expect a saleable article, *answering the description in the contract.* Without any particular warranty, *this* is an implied term in every such contract." The contract was for the purchase and sale of a commodity described generally, not described to be ordered or supplied for a particular purpose. The description of it was that it was *waste silk.* From that it is implied that it is, or in other words it is assumed that it might be, specifically described as *saleable waste silk.* The decision, therefore, is that the commodity offered and delivered must answer the description of it and be saleable waste silk. The principle is that the commodity offered must answer the description of it in the contract. *Laing* v. *Fidgeon* (5) is to the same effect. In *Gray* v. *Cox* (6), in 1825, the case was decided on a variance; but Abbott, C.J., stated that he was of opinion, "that if a person sold a commodity *for a particular purpose,* he must be understood to warrant it *reasonably fit and proper for such purpose.*" The commodity ordered was copper for sheathing the ship *Coventry.* It was proved that no defect could be discovered by inspection of the article, and it was admitted that the defendants were ignorant of the defective quality of the copper. It is obvious that Lord

(1) Law Rep. 2 Q. B. 412; in error 4 Q. B. 379.
(2) 2 East, 314.
(3) 1 Camp. 190.
(4) 4 Camp. 144.
(5) 6 Taunt. 108.
(6) 4 B. & C. 108, 115.

Tenterden did not consider the seller relieved by reason of the defect being latent.

This ruling of Lord Tenterden was adopted in the decision of *Jones* v. *Bright* (1), in 1829. The contract was for copper sheathing for a ship. The question proposed by Ludlow, Serjt., in argument was, "whether the law will, according to the dictum of Lord Tenterden, in *Gray* v. *Cox* (2) lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and *that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him.*" Here, therefore, the whole proposition, with and without limitations, was plainly laid before the judges for their consideration.

The answer given by Best, C.J., was: "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable,—that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. . . . Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . The law then resolves itself into this,—that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." Nothing can be more clear than that the rule is advisedly enunciated as a warranty without limitation. *Brown* v. *Edgington* (3) is to the same effect.

In *Wieler* v. *Schilizzi* (4) the contract was for "Calcutta linseed." Jervis, C.J., told the jury that the question for them to consider was, "whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the *description of it in the contract.*" Cress-

(1) 5 Bing. 533, 540.
(2) 4 B. & C. at p. 115.
(3) 2 M. & G. 279.
(4) 17 C. B. 619, 622; 25 L. J. (C.P.) 89.

1877

RANDALL v. NEWSON.

well, J., said, "They were to say whether the article delivered *reasonably answered the description* of Calcutta linseed." Crowder, J., said, "The jury in effect found that the article delivered did not *reasonably answer the description in the contract.*" Willes, J., said, "The purchaser had a right to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as *not reasonably to answer that description*, he did not get what he bargained for." In this case it is to be observed that all the judges adopted the form of stating the principle which was used by Lord Ellenborough in *Gardiner* v. *Gray*. (1) In *Nichol* v. *Godts* (2) the contract was for "foreign refined rape oil, warranted only equal to samples." The oil offered was equal to samples, but both samples and oil were adulterated. Parke, B., told the jury "that the statement in the sold-note as to the samples related to *the quality only of the* article, and that according to the contract the defendant was entitled to have *rape oil* delivered to him." Platt, B., in banc, said: "I understand that the oil to be delivered was to be equal to the samples *in quality*. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not *being foreign refined rape oil at all.* And the learned judge told the jury that if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under *the name and description* of foreign refined rape oil, the plaintiff would have been entitled to succeed; but the question was put to the jury, and they were of opinion that it was not known as such." And Parke, B., said "the evidence went to shew that the oil offered *did not answer the description of the article sold.*"

This form of stating the rule was distinctly adopted in *Josling* v. *Kingsford* (3), by Erle, C.J., and Willes, J. Erle, C.J. told the jury "that the defendant could only perform his part of the contract by delivering that which in commercial language might properly be said to come *under the denomination* of oxalic acid; and that if they should be of opinion that the article delivered by the defend-

(1) 4 Camp. 144.
(2) 10 Ex. 191; 23 L. J. (Ex.) 314.
(3) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.

ant as oxalic acid *did not properly fulfil* that *description* they should find for the plaintiff."

I have cited these cases, and the principles laid down in them, in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognised in *Jones* v. *Just.* (1) In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the *article offered or delivered shall answer the description of it contained in the contract.* That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of

(1) Law Rep. 3 Q. B. 197.

1877

RANDALL v. NEWSON.

the judgments in cases relating to contracts of purchase and sale. Unless, therefore, there is some binding authority to the contrary, we ought not now to introduce by implication a limitation into contracts of purchase and sale which has never been introduced before.

Post 457

It is said that the case of *Readhead* v. *Midland Ry. Co.* (1) in error is such a binding authority. But in answer to the cases cited of the implied undertaking in contracts of purchase and sale, Montague Smith, J., says: "The counsel for the plaintiff referred to some of the cases in which it had been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. . . . But *the agreement to sell and supply for a price* which may be assumed to represent their value is a *contract of a different nature from a contract to carry*, and *has essentially different incidents attaching* to it." It is true that the learned judge afterwards says: "Even in the cases of contracts to supply goods it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case which no skill or care could prevent or detect." But it seems impossible logically to hold that a case,—in which the Court declined to follow the decisions on contracts of purchase and sale, on the ground that those contracts are of a different nature and have essentially different incidents from the contract to carry, which was in discussion in that case,—can be fairly binding on this Court, so as to oblige it to introduce a particular limitation into a contract of purchase and sale, because, in that case, it was introduced into a contract to carry passengers.

The case of *Francis* v. *Cockrell* (2) is based upon *Readhead* v. *Midland Ry. Co.* (1), and is therefore of itself no more a binding authority on us in this case than the other. It is true, however, that the Lord Chief Baron, going further than the doubt expressed by Montague Smith, J., does recognise the limitation as applicable to contracts of purchase and sale. (3) But the statement of the learned judge was not necessary, and there-

(1) Law Rep. 4 Q. B. 379, 386. (2) Law Rep. 5 Q. B. 501, 503.
(3) Law Rep. 5 Q. B. at p. 503.

fore is not binding, though of course inviting a careful consideration of the older cases. After such consideration, for the reasons before given, we are of opinion that the undertaking of the present defendant was not restricted by the limitations applied to the contract of carriage in *Readhead* v. *Midland Ry. Co.* (1), and that so long as the verdict in this case stands it imposes a liability on the defendant. We are, therefore, of opinion that the judgment of the Court of Queen's Bench directing the judgment to be entered for the defendant was wrong.

In the Court of Queen's Bench a cross rule had been obtained on behalf of the plaintiff for a new trial, on the ground of misdirection as to the measure of damages. In consequence of the decision that the defendant was not liable at all, it became useless to argue the point. But Mr. Gates has renewed it before us, and has asked for a new trial on the ground of such misdirection, desiring to have such new trial confined to the question of damage only. We think that a question should have been left to the jury similar to that which was left in *Smith* v. *Green* (2), namely, whether the injury to the horses was or was not a natural consequence of the defect in the pole. There has been a miscarriage in this respect at all events. We are asked to confine the new trial to the question of damages, but considering that the real question is not whether the pole was perfect, but only whether it was reasonably fit, we cannot think that the findings of the jury as to the questions left to them in order to determine the liability of the defendant are so satisfactory as to authorize us to confine the question to be raised on a new trial to the damages only. We think that the judgment of the Court of Queen's Bench should be reversed, and that the order should be for a new trial generally, if the plaintiff elects to have a new trial at all. If he does not, the verdict and judgment for the plaintiff for 3*l.* will stand.

The plaintiff has succeeded on the appeal, and should therefore have the costs of the appeal.

KELLY, C.B., in assenting to the judgment of the Court, observed, that, if the language imputed to him in *Francis* v. *Cock-*

(1) Law Rep. 4 Q. B. 379. (2) 1 C. P. D. 92.

1877

RANDALL v. NEWSON.

rell (1) be correctly reported, he must have expressed himself inaccurately, and he had no intention to apply the doctrine in *Readhead's Case* (2) to a contract for the sale and purchase of an article to be applied to a specific purpose.

Judgment reversed.

Solicitors for plaintiff: *Brundrett, Randall, & Govett.*
Solicitor for defendant: *F. Taylor.*

Jan. 22.

[IN THE COURT OF APPEAL.]

SHAND AND OTHERS *v.* BOWES AND OTHERS.

Mercantile Contract—Time of Shipment—Dates of Bills of Lading.

Defendants, by contracts, dated London, 17th March, bought of plaintiffs "about 600 tons of Madras rice, to be shipped at Madras or coast for this port during the months of March $\frac{\text{and}}{\text{or}}$ April, per *Rajah of Cochin*." The 600 tons filled 8200 bags, of which 7120 were shipped between the 23rd and 28th of February, in three parcels, and the last bill of lading was signed on the latter day; of the other 1080 bags, 1030 were put on board on the 28th of February, and the remaining 50 on the 3rd of March, and the bill of lading signed on that day. Defendants having refused to accept the rice:—

Held, reversing the judgment of the Queen's Bench Division, that under the circumstances the rice was shipped according to the contracts, for that the fact of there being several bills of lading instead of the whole being shipped under one bill made no difference; and that the defendants were bound to accept the rice.

Alexander v. *Vanderzee* (Law Rep. 7 C. P. 530) followed.

THE defendants had (by two contracts for 300 tons each) agreed to buy from the plaintiffs 600 tons of rice, to be shipped at Madras during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per ship *Rajah of Cochin*. The rice was in 8200 bags, of which 7120 were put on board the *Rajah of Cochin* between the 23rd of February and 28th of February in three parcels, for which three bills of lading, dated in February, were signed. Of the remaining 1080 bags, all but 50 were put on board on the 28th of February; the last 50 were put on board on the 3rd of March, and a bill of lading for the 1080 was then signed. The defendants refused to

(1) Law Rep. 5 Q. B. at p. 503. (2) Law Rep. 4 Q. B. 379.

1877

SHAND v. BOWES.

receive the rice on the ground that it was not shipped in March or April, and the plaintiffs brought an action for the price. At the trial evidence was given that the rice was as good when put on board in February as in March or April, and would be the spring crop; and there was also much evidence as to the meaning of the word "shipped," the effect of which is stated in the judgment of the Court of Appeal.

The jury having found for the plaintiffs, the defendants moved, pursuant to leave, to enter judgment for the defendants; and also obtained an order nisi in the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence, cause to be shewn in the Queen's Bench Division.

The Queen's Bench Division gave judgment for the defendants, giving no decision as to the new trial. (1)

The plaintiffs appealed. (2)

Nov. 14, 1876. *Cohen, Q.C.*, and *J. C. Mathew*, for the plaintiffs. The meaning of the contract is clearly only that the rice must be shipped by the time specified: *Alexander* v. *Vanderzee*. (3) There is no pretence of any real difference in the rice. At all events, part was shipped in March, and that part the defendants must take, and they then cannot reject the other part. The captain had no authority to give separate bills of lading, and besides the dates of the bills of lading do not affect the shipping. At least, there was sufficient ambiguity in the contracts for the question to be left to the jury, and they have found for the plaintiffs. If no particular ship had been named, there might be a difference, but the naming of the ship makes it clear that the parties only intended that the rice should be spring rice, and shipped in due time.

Benjamin, Q.C., and *G. Bruce*, for the defendants. The defendants have bargained for rice to be shipped in these particular months, and no other rice will suit the defendants or their customers. In *Alexander* v. *Vanderzee* (3) the contract was for whole cargoes. The judge ought to have directed the jury to

(1) 1 Q. B. D. 470.

(2) It was agreed that the appeal from the judgment of the Queen's Bench Division and the motion for a new trial should be brought on together.

(3) Law Rep. 7 C. P. 530.

1877

SHAND v. BOWES.

find for the defendants. Perhaps the defendants must take the part shipped in March, but they cannot be bound to take that which was shipped in February.

Cohen, Q.C., in reply.

Cur. adv. vult.

Jan. 22, 1877. The judgment of the Court (Kelly, C.B., Mellish, L.J., and Brett and Amphlett, JJ.A.) was delivered by

MELLISH, L.J. The question we have to determine in this case is, whether the Queen's Bench Division have properly held as a matter of law, contrary to the finding of the jury, that the defendants were justified in refusing to accept the 600 tons of rice upon the ground that they were not shipped in March or April, within the meaning of the two contracts between the parties. The Court below came to the conclusion that they were justified, upon the ground that each parcel of rice must be deemed to have been completely shipped at the time when the bill of lading for that parcel was signed, and that therefore nine-tenths of the whole quantity were shipped in February; and it is obvious that if the whole 600 tons had been shipped under one bill of lading, instead of being shipped in four parcels under four different bills of lading, the Court below would have come to a different conclusion, and would have held the case to have been governed by *Alexander* v. *Vanderzee* (1), because they admit that the 1080 bags included in the last bill of lading ought to be held to have been shipped in March, because the last fifty bags of that parcel were put on board in March. We have therefore to consider whether, having regard to the terms of the two contracts, the circumstance of several bills of lading having been signed for different parcels of the rice instead of the whole being shipped under one bill of lading makes any difference, and we are of opinion that it does not. A bill of lading is no part of the shipment or shipping of the cargo. It is only a declaration that the cargo mentioned in it has been shipped, and is to be delivered on certain conditions. The contracts contain no reference whatever to bills of lading. They were contracts to deliver rice ex quay, or ex warehouse. The first contract might have been fulfilled by

2 App Cas 483

(1) Law Rep. 7 C. P. 530.

1877

SHAND v. BOWES.

the delivery of any 300 tons out of the 600 tons of rice shipped under all the bills of lading, and the second contract by the delivery of the remaining quantity, and we think that the question we have to determine is practically the same (and the parties themselves have so treated it) as if there had been only one contract to sell 600 tons, and that, as the bills of lading were not to be transferred by the vendor to the purchaser, it could not matter whether the goods were shipped by the vendor under one or under several bills of lading.

The real question is whether, in order to fulfil a contract that 600 tons of rice should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April. This seems to us to be substantially the same question as that which was decided by the Court and jury in *Alexander* v. *Vanderzee*. (1) The word "shipped" is, we think, capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a great additional burden on the seller without any corresponding benefit to the purchaser, and the consequence of adopting it would, we think, be that purchasers would, without any real reason, frequently obtain an excuse for rejecting contracts when prices had dropped. The sole object of the purchaser of such produce as this in confining the seller to a particular time, within which the goods must have been shipped, is, as far as appears, that he may know when the goods are likely to arrive. That object seems as effectually attained by knowing when the shipment will be or has been completed as by knowing when each part of the goods was put on board. We therefore should entirely agree with the decision in *Alexander* v. *Vanderzee* (1), even if that decision was not binding on us. We are of opinion, therefore, that the judgment of the Queen's Bench Division to enter the verdict for the defendants ought to be reversed.

We have next to consider whether the order made by the Court of Appeal for a new trial, upon the ground that the verdict was

(1) Law Rep. 7 C. P. 530.

1877

SHAND v. BOWES.

2 App Cas 470

against the weight of evidence, ought to be made absolute, and on this part of the case we have had considerable doubt. Several witnesses, and amongst them the plaintiff himself, have deposed that they understood the word "shipped" to mean put on board, and that the whole quantity sold must be put on board within the specified time, and no witness says that the word in mercantile usage has any other meaning, and the jury appear to have based their verdict upon a distinction, which, though made by one or two witnesses, we do not think satisfactory, between contracts in which the ship is named, and contracts which may be fulfilled by delivering goods out of any ship. On the other hand, we think it is obvious, on reading through the evidence, that each witness was not speaking of any real mercantile meaning which the word "shipped" or "shipment" bears, but was putting his own construction on the word, and, as persons who are not lawyers are apt to do, interpreted the word literally. No witness stated that he had known instances of goods rejected, and such rejection acquiesced in, when the shipment had been completed within the appointed time, because the whole of the goods were not put on board during that time; and this is the sort of evidence which, in our opinion, ought to be given before the rule established by the case of *Alexander* v. *Vanderzee* (1) is departed from. We do not believe that if a new trial was ordered such evidence could be obtained. We are of opinion, therefore, that the rule for a new trial should be discharged.

Judgment reversed and entered for the plaintiffs.

Solicitors for plaintiffs: *Stevens, Wilkinson, & Harries.*
Solicitors for defendants: *Lattey & Hart.*

(1) Law Rep. 7 C. P. 530.

[IN THE COURT OF APPEAL.]

1877
Jan. 24.

WEBB *v.* MANSEL.

Practice—Appeal—Setting down Motion—Costs—Order LVIII., Rule 8.

Where notice of motion of appeal is given, but the party giving it neglects to take the proceedings before the officer of the court directed by Order LVIII., Rule 8, and the matter is not in the court paper of the day, the other party ought not to appear, but may make a substantive application for his costs of the motion.

THE Queen's Bench Division had in this case made an order that the defendant should pay a sum of money into court. The defendant, on the 18th of January, gave to the plaintiff a four days' notice of motion of appeal, but did not produce to the proper officer of the Court the order appealed from, or leave with him a copy of the notice of motion, as directed by Order LVIII., Rule 8 (1); and the motion did not appear in the court paper for the day, which was the day on which the Court heard appeals from interlocutory orders.

C. H. Anderson, for the plaintiff, asked for the costs of the motion. The notice was given, and the plaintiff conceived himself bound to instruct counsel to appear.

The defendant did not appear.

COCKBURN, C.J. There is nothing before the Court of Appeal, and the plaintiff was not bound to appear as the motion is not in the paper. Giving notice of motion, and then neglecting to take the further proceedings directed by the orders seems to be serious misconduct on the part of the defendant, but the matter is not

(1) Order LVIII., Rule 8:—"The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal, or a judge thereof, shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal."

1877

WEBB v. MANSEL.

before the Court, and the plaintiff must make a substantive motion for his costs.

MELLISH, L.J., and BAGGALLAY and BRAMWELL, JJ.A., concurred.

Solicitor for plaintiff: *Fraser.*

Jan. 17.

DARGAN, APPELLANT; DAVIES, RESPONDENT.

*Pound—Impounding Animals without Food and Water—Liability of Poundkeeper—*12 *&* 13 *Vict. c.* 92, *s.* 5.

Sect. 5 of 12 & 13 Vict. c. 92,—by which every person who shall impound, or cause to be impounded or confined, in any pound or receptacle of the like nature any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal,—does not apply to the keeper of the pound in which the animal is impounded.

CASE stated under 20 & 21 Vict. c. 43.

1. At a petty sessions for the division of Dimgleddy, Pembroke, an information preferred by T. Dargan, the appellant, against M. Davies, the respondent, under 12 & 13 Vict. c. 92, s. 5, charging that she did, on the 6th of January, 1876, at the parish of Maenclochog, Pembroke, impound certain animals, to wit, forty-eight sheep in the common pound there, and on that day, and also on the 7th and 8th of January, 1876, unlawfully did neglect to provide and supply the said sheep with a sufficient quantity of fit and wholesome food and water, contrary to the statute, was heard, and the information dismissed with costs.

4. Upon the hearing of the information it was proved and found as a fact that one D. Williams, between ten and eleven of the forenoon of Thursday, the 6th of January, 1876, impounded in the common pound at Maenclochog forty-two (not forty-eight) sheep, which he had theretofore seized damage feasant. They were confined therein until their release as follows:—thirty-four were taken out at midday on the following Friday, and the remaining eight on the next Tuesday; during the whole time the thirty-four sheep were so confined, Williams did not provide any of the forty-two with food

or water, but after the release of the former the remaining eight were, about 7 o'clock a.m., on Saturday, the 8th of January, provided with hay. The respondent was, at the time of the sheep being so impounded and confined, the keeper of the common pound, but she did not provide or supply the sheep with any food or water, or in any way interfere beyond receiving and keeping them in such pound until their release. The key of such pound was in the sole possession of the respondent during this period, and she, in her capacity of pound-keeper, had the sole control over such pound.

5. It was contended by the appellant that the words, in 12 & 13 Vict. c. 92, s. 5, "Every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature any animal" extended to and included the respondent in her capacity of pound-keeper, and that, as such, she was bound to provide the sheep with food and water, with power, under s. 6, to recover the cost thereof from the owner of such animals.

6. It was contended on behalf of the respondent that the section had no such operation.

7. The justices being of opinion that the section did not, under these circumstances, apply to or include the respondent, but the person or persons who delivered or caused to be delivered the said sheep into her custody, gave their determination against the appellant in the manner above stated.

8. The question for the opinion of the Court was whether, under the above circumstances, the information was legally and properly dismissed.

Morton Smith, for the appellant. The object of 12 & 13 Vict. c. 92, s. 5, was to compel the person who has control over the animal while it is in the pound to supply it with food and water.

[MELLOR, J. I cannot see that the statute requires the pound-keeper to find food for the cattle brought to his pound. There was here nothing to prevent the sheep being fed by the person who brought them.]

It often happens that cattle are placed in the pound by a police constable, or some person who cannot be expected to feed them while in the pound. In such a case, if the pound-keeper is not

1877

DARGAN v. DAVIES.

liable, the animals may die of hunger. The penalty does not extend to the owner of the animals, and the privilege of selling them to pay expenses is only given to the person confining them.

[LUSH, J. In Gilbert on Distress, p. 66, note, it is stated that cows taken as estrays may be milked, because he that takes them is bound, so long as he keeps them, to find them in provisions and preserve them from damage; citing 1 Roll. Abr. p. 889; 1 Leon. 220. The Act seems to enforce by penalties the common-law obligation.]

The Act and the subsequent Act, 17 & 18 Vict. c. 60, s. 1 (which re-enacts certain provisions in the repealed Act, 5 & 6 Wm. 4, c. 59) (1), do not enable any stranger who feeds the

(1) By 5 & 6 Wm. 4, c. 59, s. 4, after reciting that "great cruelties are practised by reason of keeping and detaining horses, asses, and other cattle, and animals impounded and confined without food frequently for many days," it is enacted that "every person who shall impound, or confine, or cause to be impounded or confined, any horse, ass, or other cattle, or animal, in any common pound, open pound, or close pound, or in any inclosed place shall, and he is hereby required to find, provide, and supply such horse, ass, &c., daily with good and sufficient food and nourishment for so long a time as such horse, &c., shall remain and continue so impounded or confined; and every such person who shall so find, provide, &c., is empowered to recover from the owner of such cattle or animal not exceeding double the full value of the food so supplied, by proceeding before any one justice of the peace, &c." This section proceeds to authorize such person instead of proceeding to recover the value of the food, to sell, after the expiration of seven clear days from the time of impounding the same, any such horse, ass, &c., and to apply the proceeds in discharge of the value.

By s. 5, in case any horse, &c., shall so remain impounded or confined without sufficient daily food more than twenty-four hours, any person may enter the pound and supply the animal with food without being liable to an action of trespass.

By s. 6, a penalty of five shillings is imposed on any person so impounding an animal for every day during which he neglects to supply the animal with food.

By 12 & 13 Vict. c. 92, the Act 5 & 6 Wm. 4, c. 59, is repealed. By s. 5, "every person who shall impound or confine, or cause to be impounded or confined in any pound, or receptacle of the like nature, any animal, shall provide and supply, during such confinement, a sufficient quantity of fit and wholesome food and water to such animal, and every such person who shall refuse or neglect to provide and supply such animal with such food and water shall for every such offence forfeit and pay a penalty of twenty shillings."

By s. 6, power is given for any person to supply food and water to any animal impounded without fit and sufficient food and water for more than twelve hours, and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, to the person who shall supply the same, and such cost

animals before they have been confined twelve hours to recover his expenses; therefore, in a case where the owner is unknown and the person bringing the animals to the pound has no interest in them, it is important that there should be on the spot some person on whom the duty of supplying food is imposed.

[LUSH, J. The legislature seem to have thought that the penalty of 20*s.* was enough to induce persons interested in the cattle to supply food to them during the first twelve hours.]

The pound-keeper is practically the person who confines the animals.

No counsel appeared for the respondent.

MELLOR, J. This case has been very well argued, but the counsel for the appellant has failed to convince me that a pound-keeper is within the terms of the Act 12 & 13 Vict. c. 92, s. 5, which enacted that every person who should impound or confine in any pound, or receptacle of the like nature, any animal, should provide food and water for it, and upon default should forfeit twenty shillings. Now, it appears to me that, looking at the language of the Act, the legislature never intended it to apply to the keeper of a pound, but intended it to apply to the actor, as I may call him, in the confinement of the animal, the person who takes the animal to the pound for the purpose of securing compensation for the damages he has sustained from its being allowed to wander at large. One would expect that, if the keeper of a pound was meant to be included in the Acts, we should find express words describing him; but I think that it was believed that the penalty on the person impounding the animal would be enough to insure its being properly fed. The original Act, 5 & 6 Wm. 4, c. 59, had already provided that the animal should be fed, under a penalty of five shillings, and the object of the later Act was simply to increase the penalty, and to enable any benevolent

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may be recovered in like manner as penalties under the Act.

By 17 & 18 Vict. c. 60, s. 1, power is given to any person who shall impound an animal and supply it with food to recover double value from the owner by summary procedure, or, at his option, after the expiration of seven clear days from the time of impounding, to sell the animal and apply the proceeds in discharge of the value of such food and water.

1877

DARGAN v. DAVIES.

person who supplied food to the animal to recover the expense. It was in the first instance left to the person bringing the animal to the pound to supply food to it within twenty-four hours; if he did not, any benevolent person might enter the pound and do so, and now that person is enabled to recover the expense to which he has been put, but not against the person who has merely received the animal in the pound. The penalty is imposed not upon him, but upon the person who brought the animal to the pound, and who ordered it to be kept imprisoned. I think that the justices have followed the ordinary meaning of the words, and that their decision was right.

LUSH, J. I am also of opinion that the decision of the justices was right, and that there are no words in the Act of Parliament which include such a person as a pound-keeper. The Act 5 & 6 Wm. 4, c. 59, s. 4, recited that great cruelties are practised by reason of keeping and detaining horses, asses, and other cattle impounded and confined without food "frequently" for many days. (The word "frequently" ought to have been before "practised," as is shewn by the preamble to the Act.) The section then enacts that "every person who shall impound or confine any horse, ass, &c., in any common pound, open pound, or close pound, or in any enclosed place, shall provide such horse, &c., with good and sufficient food." Now the framers of the Act seem to have thought that it might be construed to apply only to common pounds, and accordingly in the next Act, 12 & 13 Vict. c. 92, s. 5, which repealed 5 & 6 Wm. 4, c. 59, it was intended to extend the former enactment to any inclosed place, the section providing that every person who should impound or confine, &c., in any pound or receptacle of the like nature, any animal, should provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal, under a penalty of 5*s.* for every day's default. The Act 5 & 6 Wm. 4, c. 59, gave to the person who had impounded the animal a remedy for the cost of such food by summary procedure, or by the sale of the animal, and also provided that, if the animal was kept without food for more than twenty-four hours, any benevolent person might enter the pound to supply it with food, but it gave such person no

remedy against the owner of the animal. The repealing Act made the penalty more stringent, increasing it to 20*s.*, gave benevolent persons the right of entering the pound to feed the animal within twelve hours instead of twenty-four, and gave them a remedy by summary procedure for the cost of such food against the owner of the animal. But it was found that no provisions had been substituted for some of those in 5 & 6 Wm. 4 which had been repealed, so a third Act, 17 & 18 Vict. c. 60, was passed. The recital of this Act is strongly in favour of our view as to its construction. It recites the two previous Acts, and adds, "whereas it is doubtful whether the last-recited Act" (12 & 13 Vict. c. 92) "gives any remedy to the person impounding for the recovery of a compensation for the food and water provided for any animal, and no power is given to sell the animal, although full provisions for those purposes were contained in the first-recited Act" (the fact being that the repealing Act had not re-enacted the provisions enabling the person impounding to recover by the sale of the animal the expense of feeding it). But this Act gives the power of selling the animal only to the person impounding it. He is enabled, after supplying the animal with food, upon giving notice, to sell it seven days from the time when it was first lodged in the pound; but I quite agree with the observation of the counsel for the appellant that this remedy is confined to the person impounding the animal. The result is, that any benevolent person who supplies food has still no power of selling. There is nothing to extend the liability of supplying food to the keeper of the pound, and as this is an Act imposing new duties under penalties, one would expect to find that the persons affected by it would be distinctly specified. But, although the Act 12 & 13 Vict. c. 92, in a later section (s. 8) speaks of "every person keeping, or using, or acting in the management of any place for the purpose of slaughtering horses or other cattle," shewing that, where necessary, the keeper of a place where animals are confined is sufficiently described, there is nothing in the sections under our consideration describing the keeper of a pound.

Judgment for the respondent.

Solicitor for appellant: *A. Leslie.*

1876
Dec. 20.

STUBBS *v.* BOYLE.

Practice—Trial before Official Referee—Application for New Trial—Evidence of what took place at Trial—Supreme Court of Judicature Act, 1873, *ss.* 58, 59—*Supreme Court of Judicature Act*, 1875—*Order XL., Rules* 5, 6.

Upon a motion to set aside or vary the judgment in a case tried before an official referee under the Supreme Court of Judicature Act, 1873, ss. 58, 59, an affidavit, or some evidence of what took place at the trial, must be furnished to the Court.

In this case, tried before one of the official referees, judgment had been entered for the plaintiff. (1)

R. Lane moved to enter judgment for the defendant on the findings of the referee, or to send back the case to him for a fuller report, or for a new trial, on the ground that the verdict was against the evidence. He had neither a note by the referee, nor an affidavit of the facts proved, but having been counsel at the trial, proposed to give his own statement of what took place.

Per Curiam (Kelly, C.B., and Mellor J.): In order that the Court may decide whether the decision of the official referee ought to be reviewed, the defendant must produce an affidavit or some evidence of what took place at the trial. The motion must be postponed to enable the defendant to produce such evidence.

Solicitors for defendant: *Emmet & Son.*

(1) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 58, "In all cases of any references to or trial by referees under this Act the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of Court or (subject to such rules) by the Court or judge ordering such reference or trial, and the report of any referee upon any question of fact on any such trial, shall (unless set aside by the Court) be equivalent to the verdict of a jury.

Sect. 59: "With respect to all such proceedings before referees and their reports, the Court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court, with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854."

By the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), Order XL., Rule 5, "Where at the trial of an action . . . . a referee has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment and to enter any other judgment, on the ground that upon the finding, as entered, the judgment so directed is wrong."

TURNER *v.* THE GREAT WESTERN RAILWAY COMPANY.

1877
Jan. 17.

County Court—Appeal by Motion—Action for Amount not exceeding 20*l.*—13 & 14 *Vict. c.* 61, *ss.* 1, 14; 30 & 31 *Vict. c.* 142, *s.* 13; 38 & 39 *Vict. c.* 50, *s.* 6.

Under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6—by which "in any cause, suit, or proceeding, &c., tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for the person aggrieved by the ruling, order, direction, or decision of the judge, to appeal against such order, &c., by motion to the Court to which such appeal lies, instead of by special case"—the power of appealing by motion applies to all actions where leave to appeal may be given, as well as to actions where such leave is unnecessary.

THE plaintiff having recovered a verdict in a county court in an action for less than 20*l.*, the judge gave the defendants leave to appeal, and they appealed by motion to this Court.

Bosanquet, for the plaintiff. There is a preliminary objection to the hearing of this case, which is, that, the action being for an amount not exceeding 20*l.*, there is no right of appeal by motion. The right of appeal by motion is given by the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6 (1), and is limited to any county court proceeding in which the person aggrieved has a right of appeal. The County Courts Act, 1850 (13 & 14 Vict. c. 61),

(1) By 13 & 14 Vict. c. 61, s. 1, the jurisdiction of county courts is extended to any demand not exceeding 50*l.* By s. 14, if either party, in any cause of the amount to which jurisdiction is given to the county courts by this Act, shall be dissatisfied with the determination of the Court in point of law, he may appeal to the superior Courts, and by s. 15 the appeal is to be by special case, to be settled by the judge.

By 30 & 31 Vict. c. 142, s. 13, an appeal from the decision of a county court on the same grounds, and subject to the same conditions as provided by 13 & 14 Vict. c. 61, s. 14, shall be allowed in all actions of ejectment, &c., and with the leave of the judge an appeal shall be allowed in actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal should be allowed.

By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, in any cause, suit, or proceeding, &c., tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first case, and to be granted on such terms, &c.

1877

TURNER v. GREAT WESTERN RAILWAY CO.

which extended the general jurisdiction of the Courts from 20*l.* to 50*l.*, first gave, by s. 14, a right of appeal, but this right was expressly restricted to causes of the amount to which jurisdiction is given by the Act. Under 30 & 31 Vict. c. 142, s. 13, an appeal is given with the leave of the judge in actions in which it had not previously been allowed, including, of course, actions like the present for an amount less than 20*l.* It follows that, though the defendants have a power of appealing, this is not a proceeding in which they have a right to appeal. The words of the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, ought to receive a strict construction. The section, after giving the appeal by motion, enacts that at the trial or hearing of the cause the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, &c., and furnish a copy of the notes for the purposes of the appeal. But the old mode of proceeding by special case is not abolished, and as there is only a power of requiring the judge to take a note where the party has a right of appeal, there would be no machinery for securing a note in a cause like the present, as there is no appeal until the judge has given leave, and he cannot then be expected to make a note from his recollection of the case.

[LUSH, J. I do not see any insuperable difficulty in getting the judge to take a note after he has given his decision. The judge cannot revoke the leave after he has once given it.]

The class of cases subject to appeal by motion is defined by the section.

R. E. Webster, for the defendants, was stopped.

PER CURIAM (Mellor and Lush, JJ.): The objection must be overruled. We think that there is no distinction with regard to appeal by motion between cases where leave to appeal may be given and those in which it is not necessary.

Solicitor for plaintiff: *H. Tyrrell.*

Solicitor for defendants: *R. R. Nelson.*

HOOPER, APPELLANT; KENSHOLE, RESPONDENT. 1877

Jan. 27.

Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13—*Exmouth Market Act*, 1867 (30 *Vict. c. xix.*), *s.* 20.

The Exmouth Market Act, 1867 (30 Vict. c. xix.), which incorporates the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), by s. 20 enacts that no unlicensed person shall sell in any open place within the limits of the market, not being the new market place or his own dwelling-house or shop, any articles, &c.

The respondent sold articles of the description mentioned in the Act in a skittle-ground let to him for two days. The place where the sale took place was covered with a roof and inclosed, but had a door leading into the street:—

Held, that the place of sale was not the respondent's shop within the exception in the Act.

CASE stated by justices for Devon, under 20 & 21 Vict. c. 43.

An information having been preferred by H. H. Hooper, the appellant, against R. Kenshole, the respondent, under the 13th and 19th sections of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), and the 20th section of the Exmouth Market Act, 1867 (30 Vict. c. xix. (1)), in which Act the Markets and Fairs Clauses

(1) The Exmouth Market Act (30 Vict. c. xix.), s. 2, incorporates the Markets and Fairs Clauses Act, 1847 (save so far as any of the provisions are varied and excepted by this Act).

By s. 18, the several tolls specified in the 1st schedule to the Act from time to time may be demanded and taken by the officers of the undertakers, and by the lessees of the undertakers (one of such tolls being on the sale of manufactured goods).

By s. 19, the undertakers may grant to any person, who is desirous of selling or exposing for sale in any of the open places within the limits of the market, not being the new market place, any article in respect of the sale or exposure for sale of which in the new market place, any toll is by this Act granted, a licence so to do for not exceeding one year at a time, &c.

By s. 20, "If any person, not having a licence from the undertakers so to do, sell or expose for sale in any open place within the limits of the market, not being the new market place or his own dwelling-house or shop, any article in respect of the sale or exposure for sale whereof in the new market place any toll is by this Act granted, every person so offending shall, for every such offence, forfeit not exceeding 40*s*. Provided that nothing in this Act shall prejudice or interfere with the lawful exercise by licensed hawkers of the callings for which they are so licensed."

The Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), after providing for the construction of markets, by s. 13, enacts: "After the market place is opened for public use, every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, is liable to a penalty not exceeding 40*s*."

1877

HOOPER v. KENSHOLE.

Act, 1847, is incorporated, charging that the respondent did, on the 27th of October, 1875, sell or expose for sale within the limits of the Exmouth Market, not being in the new market-place nor his own dwelling-house or shop, certain manufactured goods or merchandise without a licence from the undertakers so to do, and without having paid the market tolls; the justices upon the hearing dismissed the information.

The solicitor for the appellant, in opening the case, relied upon several authorities, and put in a notice dated March 30, 1869, and published by order of the undertakers under the Exmouth Market Act, 1867, to the effect that, on and after the 19th of April, 1869, the market would be held at the new market-place in Chapel Street; that the limits of the new market would be the limits, for the time being, of the district of the local board of health for Exmouth, and that within those limits it would, after the 19th of April, 1869, be unlawful for any person not duly licensed to sell or expose goods for sale in any open place, not being the new market place or his or her own dwelling-house or shop, without having first paid the tolls granted by the Market Act.

Witnesses were called who proved that the appellant was lessee of the market tolls at Exmouth, and that on the 27th and 28th of October, 1876, the respondent was seen in the Dolphin Inn skittle ground selling various manufactured goods, watches, sheets, &c. When told that he was selling within the limits of the local board district, and liable to toll, the respondent said that he did not come under the Act. He would have had to pay 1s. if he had occupied a stall in the market for the sale of manufactured goods, and in order to sell the goods out of the market place he ought to have got a licence to do so under the 19th section of the Exmouth Market Act. There was a doorway to go into the skittle alley from the yard and another from the house. It was part and parcel of the Dolphin Inn, and was under cover. He was selling at the end of the alley, and the goods were exposed for sale on a platform.

On behalf of the respondent the following points were taken:—

1. That by 30 Vict. c. xix., s. 20, "No person shall sell in an open place within the limits of the market not being his own dwelling-house or shop, and that the place where the goods were sold was a shop.

2. That Bannister, the owner of the goods sold, being a licensed hawker, had a right to send his goods to Exmouth for sale: *Manson* v. *Hope* (1), and that he had a right to employ the respondent as a licensed auctioneer as his agent.

It was admitted that the place where the goods were sold was let for the sale of goods on the 27th and 28th of October last.

For the defence evidence was given that Bannister was a pawnbroker in Exeter, and sent a lot of unredeemed pledges, consisting of watches, chains, &c., to Exmouth to be sold. The respondent was employed to sell them. Several sales of a like nature had taken place for years at the same place. Bannister was a licensed hawker. A table was put up and the things put on it. No toll had been asked for on former occasions. The parcels of goods went to Exmouth by carrier, some had Bannister's name painted on them, and the word "Exeter." The words "licensed hawker" were not put upon the packages. They were separate packages and all put into the carrier's cart. Bannister's name was not painted with his address and the words "licensed hawker" on the carrier's cart. The sale was advertised by bills, and Bannister's name and address, together with his trade and the fact of his being a licensed hawker, were not put in the bills, nor were they put upon the skittle alley inside or outside. Bannister was not himself present at the sale. The skittle alley was not open at the sides or ends. It was lighted with gas at night. There were several windows in it, and there was a door at the side leading into the street.

The justices, being of opinion that the place had been let before for the same purpose without any toll being demanded, and also that it was not an open place, but a shop, dismissed the information.

The questions for the opinion of the Court are:—

1. Whether any toll could be demanded, as none had heretofore been asked under similar circumstances.

2. Whether the place where the goods were sold was an open place within the limits of the Exmouth Market Act, within the meaning of that Act, or whether it could be considered as the respondent's own dwelling-house or shop within the meaning of 10 & 11 Vict. c. 14, and the Exmouth Market Act.

(1) 2 B. & S. 498; 31 L. J. (M.C.) 191.

1877

HOOPER v. KENSHOLE.

3. Whether the respondent, being an auctioneer, had any right to sell as such, or as agent for Bannister, a licensed hawker, who was not present himself at the time of the sale, and who had not complied with the requirements and provisions of the Hawkers Act (50 Geo. 3, c. 41), s. 14, in having his name, address, and calling painted on the different packages and cart, and also inside or outside of the skittle alley.

C. Bowen, for the appellant. No difficulty can arise as to the last question, for without considering whether, under 50 Geo. 3, c. 41, the licence is not strictly personal, Bannister had not fulfilled the conditions upon which he was entitled to avail himself of it, and the respondent can be in no better position than he is. With regard to the question whether the skittle ground can be considered as the respondent's shop, the justices were wrong. The word "open" in the section does not mean open to the sky, but open to the public. If any one has a piece of ground let to him temporarily, and invites the public to come upon it with the object of buying his wares, he makes it a public place within the meaning of the Act. The question is, was the place his permanent shop? [He cited *Pope* v. *Whalley* (1); *Fearon* v. *Mitchell* (2); *McHole* v. *Davies*. (3)]

No counsel appeared for the respondent.

MELLOR, J. I think this was an offence within the meaning of the Exmouth Market Act, s. 20, and the Markets and Fairs Clauses Act, 1847, s. 13. In the first place, I am clearly of opinion that the person representing a licensed hawker, who has not complied with the Act, is not protected. In the present case it seems clear that the hawker had not complied with the conditions of his licence, and therefore the respondent is not protected. I think, further, that the place where the goods were sold was not a shop within the meaning of the Exmouth Market Act, s. 20. It seems that for a short time the people who used the place as a skittle-ground were excluded from it, and it was then used by the respondent for the purpose of selling his goods. It is impossible to say

(1) 6 B. & S. 303; 34 L. J. (M.C.) 76. (2) Law Rep. 7 Q. B. 690.
(3) 1 Q. B. D. 59.

1877

HOOPER v. KENSHOLE.

that, under these circumstances, it became his shop. The result is that the magistrates ought to have convicted. They ask us a question respecting the tolls, whether they could be demanded, as none had previously been claimed? I do not think it necessary to give an answer to this question; at the same time I do not wish it to be supposed that we have any doubt as to the right to claim the tolls. The only question which we decide is that this place was not the defendant's shop within the meaning of the Act, and the case must be remitted to the justices with an expression of our opinion to this effect.

MANISTY, J. I am of the same opinion.

Case remitted accordingly.

Solicitors for appellant: *Frere, Forster, & Frere.*

PETERS, APPELLANT; COWIE, RESPONDENT.

Jan. 15.

Vagrancy Act—5 *Geo.* 4, *c.* 83, *s.* 4—*Married Woman leaving Children chargeable to Parish*—"*Person.*"

A married woman, who, deserted by her husband, and having no means of maintaining her children, leaves them, so that they become chargeable to the parish, cannot be convicted for running away and leaving them chargeable, under the Vagrancy Act, 5 Geo. 4, c. 83, s. 4.

CASE stated by justices for the city and county of Bristol under 20 & 21 Vict. c. 43.

Upon the hearing of an information dated May, 1874, preferred by the appellant, a relieving officer of the city of Bristol, against the respondent, for that she, M. A. Cowie, late of the parish of St. James, in the said city and county, charwoman, had run away and left her two children, whereby they had become chargeable to the parish, the justices dismissed the information.

It appeared that the respondent was married to a man named Cowie, in November, 1868.

That there were two children issue of such marriage, aged respectively eight and five years, and that such children became

1877

PETERS v. COWIE.

chargeable in April, 1874, and had so continued chargeable until the date of the information.

That the respondent's husband left her in July, 1870, and had never since been heard of.

That no steps had been taken by the guardians of Bristol against him for deserting his wife and children as the respondent did not come to reside in the district of the guardians until nearly four years after her husband left her.

That, about April, 1874, a woman (not the respondent) took the two children to the appellant, whereby they became chargeable.

That, upon the information, a warrant was, on the 2nd day of May, 1874, granted for the respondent's apprehension, but as her place of residence was not known, she was not taken until the 31st of May, 1876, when she was found living with her father at Liverpool.

That the respondent was entirely without property, and had no lawful means of maintaining her children but by her labour as a servant or charwoman.

The respondent, in defence, stated that the youngest of the two children was born five months after her husband deserted her. That, after she had been so left, her father sent for her to keep house for him, but that he was not able to maintain the children, and that she, having no means to keep the children went to live with her father, believing the guardians would proceed against her husband. (1)

It was contended on behalf of the appellant that the word "person," coupled with the pronoun "her," in s. 4 of 5 Geo. 4, c. 83, would include a married woman, and that the respondent

(1) By the Vagrancy Act, 5 Geo. 4, c. 83. s. 3, "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, &c., shall be deemed an idle and disorderly person within this Act," and may be committed to hard labour for a term not exceeding one month.

By s. 4, "Every person running away and leaving his wife or his or her child or children chargeable to any parish, shall be deemed a rogue and vagabond within the Act," and may be committed to hard labour for a term not exceeding three months.

having run away and left her children, whereby they became chargeable, ought to be punished.

The justices declined to convict for the following, among other reasons: they considered that if civil proceedings had been taken against the respondent to recover the cost of maintaining her children, she might have pleaded coverture; that she could only be made liable under s. 14 of the Married Women's Property Act, 1870, if she could be shewn to have "separate property," and even then her husband's liability would continue, but, that as this present charge was penal, â fortiori, it would be wrong to convict her. Moreover, the legislature had deemed it necessary by express enactment (7 & 8 Vict. c. 101, s. 6), to extend the provisions of the Vagrancy Act, in order to make women who desert their bastard children, whereby they become chargeable to any parish or union, punishable as rogues and vagabonds, while both Acts were silent as to married women.

C. Bowen, for the appellant. It must at once be conceded that the respondent could not have been charged under s. 3 for neglecting to maintain her children, inasmuch as she had no means of maintaining them. But the present charge was under s. 4, by which "every person" (nothing being said as to the means of such person) who runs away, leaving his or her children chargeable, may be convicted. The words "every person" must primâ facie include a married woman, unless there is something in the context to exclude her. The Act 7 & 8 Vict. c. 101, s. 6, whereby the operation of 5 Geo. 4, c. 83 is extended to a woman neglecting to maintain her bastard child, being able wholly or in part so to do, so that it becomes chargeable, was not rendered necessary by any narrow interpretation of the word "person," but because the word "child" had been held not to include "bastard child": *Reg.* v. *Maude*. (1) The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 14, by which "a married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject," does not apply to the offence of deserting children, which is distinct from that of not maintaining them.

(1) 6 Jur. 646.

1877

PETERS v. COWIE.

[MANISTY, J. If she is not liable to maintain her children, how can it matter to the parish whether she deserts them or not?]

If she cannot maintain, she ought, at any rate, to tend her children.

[MELLOR, J. *Reg.* v. *Maude* (1) only decided that an unmarried woman was not liable for deserting her bastard children.]

If it is unlawful for a woman to desert her bastard children, it would be surely absurd to hold that she may desert those who are legitimate.

No counsel appeared for the respondent.

MELLOR, J. I confess that I have had considerable difficulty in reconciling the decision to which I have come with the argument of Mr. Bowen, and the different sections to which he has referred. But I think that we ought to look at this Act as if the Married Women's Property Act, 1870, had never been passed, and, taking this view, it would be a very hard construction to hold that where a married woman, in consequence of her husband not maintaining her, leaves her children, she should be made liable. This, however, is the argument for the appellant, that s. 4 does include the case of a married woman, whose husband, being primâ facie the person to whom she looks for maintenance, runs away and leaves her destitute. Mr. Bowen admits that the operation of s. 3 is limited to the case of a married woman who has the means of supporting her children, but he contends that there is no such limitation in s. 4, and that a married woman situated like the respondent is included in the general description, "person," in that section. But it appears to me that it would be a very stringent construction if we were to say that the wife as well as the husband comes within the provisions of this section, and it is certainly more in accordance with the ordinary ideas of humanity that a married woman who leaves her children under circumstances like these should not be liable to punishment. I think, therefore, though with some hesitation, that the construction adopted by the justices was right.

MANISTY, J. I am of the same opinion. I entirely agree in what has been said by my Brother Mellor, that we ought to con-

(1) 6 Jur. 646.

strue this Act as if this were the time when it was first passed; but I think that we are at liberty to refer to subsequent Acts to shew the view which has been taken by the legislature of the meaning of its different sections. Mr. Bowen referred to s. 3, and contended that it was directed against the offence of neglecting to maintain children where the means or want of means of the offender are material, while s. 4 applied to the offence of deserting the children, and designedly said nothing of the means of the offender, but used the general description "any person." But we cannot shut our eyes to the fact that both sections were intended to provide for the maintenance of children, and it certainly would be a very harsh construction if, while the husband is liable to maintain his children, and the wife is not liable to maintain them, she, nevertheless, could not leave her children, even for the purpose of getting a honest livelihood, without incurring the penalties of a rogue and a vagabond. At all events, unless there is some express provision to this effect, I do not think that it could be contended that a married woman, who was not liable to maintain her children, would be within the section. Now, looking at subsequent Acts, we find that the Act 7 & 8 Vict. c. 101, to which we have been referred, imposes a penalty on a woman for not maintaining her bastard child, being able wholly or in part so to do. It will be observed that this liability is restricted by her ability to maintain her child. And, before the Married Women's Property Act, 1870, a married woman, even with separate property, was not subject to the same liability as a widow of maintaining her legitimate children. These enactments may throw some light upon the policy of the legislature; and I would also refer to 4 & 5 Wm. 4, c. 76, s. 57, which enacts that every man who marries a woman with legitimate or illegitimate children shall be liable to maintain them.

We now come back to the Act before us, 5 Geo. 4, c. 83, having seen that the tendency of the legislature has always been to look to the husband for the support of his children. Then the Married Women's Property Act, s. 14, provides that a married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow would be, and it is admitted that, under this section, a married woman might be

1877

PETERS v. COWIE.

brought within 5 Geo. 4, c. 83, s. 3, and perhaps also within s. 4. But it is only by the Act that she can be liable to maintain them. At common law a married woman has no property, and could not be made liable. Therefore, construing s. 4 with regard to this intention of the legislature, a married woman deserted by her husband ought not to be liable (unless she has separate property) to maintain her children, and I think it must follow that if she is not so liable, she ought not to be proceeded against for deserting them.

Judgment for the respondent.

Solicitors for appellant: *Merediths, Roberts, and Mills.*

Jan. 20.

[CROWN CASE RESERVED.]

THE QUEEN *v.* RYMER.

Innkeeper—Duty to provide Entertainment—Inn—Traveller—Reasonable Excuse.

The defendant was the proprietor of an hotel. Attached to the hotel and under the same roof and licence, but entered by a separate door from the street, was a refreshment bar, in which persons casually passing by obtained refreshments at a counter. The prosecutor, who was a householder living within twelve hundred yards, had been in the habit of coming to the bar with several large dogs, which had been found an annoyance to other guests; and letters had passed in which the defendant had objected to the dogs being brought into the bar, and the prosecutor had asserted his right to bring them. The prosecutor subsequently, while taking a walk for pleasure, went with one large dog to the bar and claimed to be served with refreshments, which the defendant refused him.

On an indictment charging the defendant, as an innkeeper, with refusing refreshment to the prosecutor:—

Held, that he could not be convicted: first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveller; thirdly, because, had it been otherwise, the defendant had reasonable ground for his refusal.

CASE stated by the vice-chairman of the West Sussex quarter sessions.

The defendant was tried at the Michaelmas sessions for the western division of the county of Sussex, for that he, being a licensed innkeeper, refused to supply the prosecutor with refreshments. There were several counts in the indictment varying the charge, some describing the prosecutor as a traveller, and others

1877

THE QUEEN v. RYMER.

not, but otherwise nothing turned upon the form of the indictment.

The defendant was the proprietor of the Sea House Hotel at Worthing, attached to which, and under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about ten feet wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel and serving from behind the counter.

The prosecutor, who was a householder living in the same town, within twelve hundred yards of the defendant, had been in the habit of coming to the premises of the defendant accompanied by two dogs. He had formerly three. One of the two was a savage dog, and generally wore a muzzle; the other of the two was a quiet animal. They were very large, of the St. Bernard mastiff breed.

On the 3rd of March, after a recent visit from the prosecutor, the defendant wrote to him as follows:—

"Royal Sea House Hotel,

"W. Cramer, Esq. "March 3rd, 1876.

"Dear Sir,—I regret to have to request you will be so good as not to bring your dog or dogs into the Carlton. The slop and mess this evening has been much complained of, and the dogs are as objectionable in the Carlton as in the hotel.

"I am, yours truly, James Rymer."

And on the 4th the prosecutor wrote in reply to the defendant, as follows:—

"Worthing, March 4th, 1876.

"Dear Sir,—In reply to your note of yesterday, I will so far comply with your request as not to bring my dogs into the refreshment bar, or, as you facetiously call it, the Carlton, when they are wet or dirty, but otherwise I must be allowed to follow my inclinations as heretofore. The consequences of refusing a person refreshment without reasonable cause I need not point out

1877

THE QUEEN v. RYMER.

to you, believing you superior to the general run of publicans; but I may add that hostelries, as well as public-houses, are placed under special laws, some of which tend to protect the public against the petty tyrannical, whimsical, mad freaks or acts of individual landlords. "Yours respectfully,

"Mr. James Rymer. "W. Cramer."

On the 6th of March the prosecutor went into the refreshment bar, leading the quiet dog in a chain, and demanded refreshment, asking for a glass of whiskey, but was refused by the person attending the bar by order of the defendant. The same occurred on the 7th and 8th, when he again went into the refreshment bar leading the same dog in leash, and taking it into the passage above described, and demanded refreshment, tendering the money in payment, but was again refused by the order of the defendant.

On each occasion the bar was open, the hour was proper, and the order in itself reasonable. It was proved by other hotel-keepers that complaints had been made of the prosecutor's dogs by their customers, and some of them had gone elsewhere in consequence, and that the prosecutor had been remonstrated with; and himself admitted to one of the witnesses that, "No doubt his dogs were a nuisance to the hotel-keepers." It was also proved that other tradesmen in the town had complained of the dogs, and also that the dog in question had upon one occasion vomited on the door-mat of a tradesman's shop in the town. It was not proved that the prosecutor was a traveller in any sense, otherwise than that he was walking about the town with his dog for his own recreation and amusement.

It was contended on the part of the prosecutor that, by refusing to provide him with refreshments, the defendant had committed an indictable offence. On the other hand it was urged on the part of the defendant, first, that the prosecutor was a local resident and not a traveller, and therefore there was no obligation on the part of the defendant to serve him; and, secondly, that, at all events, the defendant was justified under the foregoing circumstances in refusing to do so.

The vice-chairman declined to stop the case, which ultimately went to the jury. He told them that primâ facie the defendant was bound by law to supply the prosecutor, as one of the public,

with refreshment upon his reasonable demand; that he could not select his customers, or reject any from caprice or dislike; but that if the prosecutor insisted (as he did) upon being accompanied by his dog, which, from its size, breed, nature, or habits, was obnoxious to his customers, and a nuisance in his business, he was justified (particularly after notice) in refusing to admit or serve the prosecutor.

The jury found the defendant guilty, and, in answer to the vice-chairman, said they considered the defendant was bound to serve the prosecutor, though accompanied by any dog, even a savage one; but they found, as a fact, that the dog in question was not a savage one.

The defendant was bound over on his own recognizance in 50*l.* to appear to receive judgment when called upon.

If the Court should be of opinion that the conviction was right, it was to stand, otherwise to be quashed.

Jan. 25. No counsel appeared.

KELLY, C.B. In this case, if there were any reasonable ground for doubt, we should regret that the case has not been argued by counsel. But fortunately, though the case is of importance, it presents no difficulty whatever. The indictment charges the defendant that, being an inn-keeper, and under the obligation to receive the prosecutor in his inn, he refused to do so without having any reasonable cause or excuse for such refusal.

Three questions arise: first, whether the place in which the prosecutor claimed to be received and served was an inn; secondly, whether the prosecutor was a traveller; and, thirdly, assuming both these questions answered in the affirmative, whether the defendant's refusal was without reasonable cause.

As to the first question, whether the place in question was an inn, we must look at the facts. The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate entrance, and appears to have been a mere shop in which spirits

1877

THE QUEEN v. RYMER.

are retailed across a counter. The letters, too, make it plain that this was the place to which admission was claimed by the prosecutor. Such a place is not an inn within the meaning of the common-law rule. An inn is a place "instituted for passengers and wayfaring men:" *Calye's Case.* (1) A tavern is not within the definition. In such a place as this no one has a right to insist on being served any more than in any other shop. Therefore, on this ground, even if it stood alone, this conviction must be quashed.

The second question is, whether the prosecutor was a traveller. I need hardly cite authorities to shew that it is essential to such a prosecution that the prosecutor should be a traveller. If any be wanted, the case of *Rex* v. *Llewellyn* (2), in which an indictment was held bad for want of an allegation to that effect, is an express authority upon the point. Here the prosecutor was not a traveller in any sense whatever.

Thirdly, even if both the foregoing questions had been answered otherwise, I think it clear that the defendant had reasonable cause for refusing to receive the prosecutor. I do not lay down positively that under no circumstances could a guest have a right to bring a dog into an inn. There may possibly be circumstances in which, if a person came to an inn with a dog, and the innkeeper refused to put up the dog in any stable or outhouse, and there were nothing that could make the dog a cause of alarm or annoyance to others, the guest might be justified in bringing the dog into the inn. But it is not necessary to decide any such question. In this case, looking at the previous facts, the number of dogs previously brought, and their kind and behaviour, the nature of the right claimed by the prosecutor in his letter, and the size and class of the dog, I think the defendant would have had ample ground for his refusal even if the place had been an inn and the prosecutor a traveller.

DENMAN, J. I am of the same opinion upon all points. The principles laid down in *Burgess* v. *Clements* (3) shew that the object of the law upon the subject of an innkeeper's liability, is

(1) 8 Co. Rep. 32; 1 Smith L. C. 7th ed. p. 122.
(2) 12 Mod. 445.
(3) 4 M. & S. 306.

1877

THE QUEEN v. RYMER.

merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging. With reference to the question of reasonable excuse, the finding of the jury does not affect the matter. I assume that, upon this part of the case, the proper question was left to them, namely, whether the defendant had reasonable cause for his refusal; and they have not found that he had not, nor is there any evidence to support such a finding. They have found what amounts to an erroneous statement of law.

FIELD, J., and HUDDLESTON, B., concurred.

MANISTY, J. I agree upon all points. I only wish to add that, in my opinion, a guest cannot, under any circumstances, insist on bringing a dog into any room or place in an inn where other guests are.

Conviction quashed.

[CROWN CASE RESERVED.]

1876

Nov. 25.

THE QUEEN *v.* GALE.

Embezzlement—Receipt on Account of Master.

The prisoner was the clerk and servant of an insurance company, and head manager at their chief office at L. In the ordinary course of business he received several cheques payable to his order from the managers of branch offices, and it was his duty to indorse these cheques and hand them over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. He then took the amount so received to the cashier and handed it over to him, saying he wished it to go against his salary, which was overdrawn to a like amount; and he got back from the cashier I. O. U.s, which he had previously given for the amount of the overdraft. The prisoner having been convicted of embezzling the proceeds of the cheques:—

Held, that the proceeds of the cheques, though received not from the bankers, but from third persons, were received on account of the company, and that the prisoner was rightly convicted.

CASE stated by the Recorder of Liverpool.

At the quarter sessions for the borough of Liverpool James Edward Gale was tried upon an indictment consisting of two counts, in the first of which the prisoner was charged with having,

1876

THE QUEEN v. GALE.

on the 19th of May, 1874, when a clerk and servant to the London and Lancashire Fire Insurance Company, Limited, embezzled 400*l.*, the property of his said masters; and in the second of which he was charged with having, when in the same capacity, and on the same day, embezzled 200*l.*, also the property of his said masters.

The evidence in support of the charge, so far as the same is material, was as follows: The said company's head office is in Liverpool. There are branch offices at Manchester, Glasgow, and elsewhere. The prisoner was the head manager of the company, and was their clerk and servant. In ordinary course he opened all letters and received all remittances sent to the head office, and handed the remittances to the cashier, who kept the ordinary books under the superintendence of the prisoner as manager, and those books were from time to time submitted to, and checked by, Mr. Blenham, the company's accountant at Liverpool. It frequently happened that the managers of the provincial offices remitted cash or cheques to the prisoner as chief manager, which it was the duty of the prisoner to hand on receipt to the cashier, and in the case of cheques it was the duty of the prisoner to indorse them if they were payable to his order, and they were then paid into the company's bankers by the cashier, and accounted for in the books.

On the 19th of May, 1874, the prisoner received on account of the company by post from Glasgow a cheque dated the 18th of May, 1874, for 400*l.*, drawn by the manager of the Glasgow branch upon the Commercial Bank of Scotland, payable to the prisoner's order. On the same day the prisoner also received on account of the company by post from Manchester a cheque for 200*l.*, dated the 19th of May, 1874, drawn by the manager of the Manchester branch upon the Manchester and County Bank, Limited, payable to the prisoner's order.

The prisoner did not hand over either of these cheques to the cashier, or inform him or anyone else of their receipt, except that he acknowledged the receipt of them to the Glasgow and Manchester managers respectively.

On the same day, the 19th of May, the prisoner indorsed and cashed both the cheques through private friends of his own, who gave him the cash and paid the cheques into their own banks.

1876

THE QUEEN v. GALE.

Later in the day, the prisoner paid 600*l.* in bank notes and gold, which was probably the produce of the cheques to the cashier of the company, saying that he wished it to go against his salary, which was then overdrawn to that amount. The cashier, supposing the money to be the prisoner's own, received it for him and handed back to the prisoner I. O. U.s for the amount which he had received from the prisoner in respect of the overdraft.

Shortly after sending the cheques, the Glasgow and Manchester managers, according to their usual practice, sent to the prisoner financial statements which, among other things, contained entries of the sending of these cheques. These statements should have been handed to the accountant by the prisoner, who, however, suppressed them both.

The prisoner's salary was 1500*l.* a year.

The fact of the prisoner's having received the cheque for 200*l.* was not known to the company or the accountant till about a month later. The prisoner, when questioned, said, "He would put it all right," and nothing was done in respect of it at that time. The remittance of the cheque for 400*l.* was not known to the company or the accountant till about four months afterwards, when the prisoner was no longer in the company's service. The prisoner became bankrupt, and the company proved upon his estate for the amount of the cheques. The prisoner never accounted for either the cheques or the money.

At the close of the case for the prosecution counsel for the prisoner submitted that the prisoner could not be properly convicted of embezzling either of the sums charged in the indictment, inasmuch as the cheques were sent to the prisoner payable to his order and required his indorsement, and the prisoner was entitled to cash the cheques and receive the cash, which was paid to him in respect of them, and, therefore, there was no embezzlement by him of the said sums or either of them. It was also submitted that there was no embezzlement, because the identical money received for the cheques was paid to the cashier, although it was so paid as the prisoner's own money, and in discharge of so much of his own overdraft.

The Recorder ruled that there was evidence of embezzlement, but consented to reserve the questions for the consideration of the Court for Crown Cases Reserved.

1876

THE QUEEN v. GALE.

The jury convicted the prisoner.

The question for the Court was whether there was evidence of embezzlement which the Recorder was justified in leaving to the jury.

Torr, Q.C. (*Kennedy* with him), for the prisoner. The conviction is bad, first, because there can be no embezzlement of money received by the servant from the master himself; and a receipt from a fellow-servant is a receipt from the master.

[LORD COLERIDGE, C.J., referred to *Reg.* v. *Keena.* (1)]

Secondly, there is no embezzlement unless the money be received "for, or in the name, or on account of" the master. That must mean that the payer of the money means it for the master, or at least that the servant purports to receive it on account of the master. That is not so here: *Reg.* v. *Wilson* (2); *Reg.* v. *Beaumont* (3); *Reg.* v. *Thorpe* (4); *Reg.* v. *Harris* (5); *Reg.* v. *Callum* (6); *Reg.* v. *Mather* (7); *Reg.* v. *Murray.* (8) Thirdly, there must be an intention to deprive the master of the money permanently. Here the prisoner paid it over to the cashier.

No counsel appeared for the prosecution.

COCKBURN, C.J. I entertain no doubt that this conviction must stand. On the face of the case, there can be no doubt that the prisoner might have been convicted of embezzling the cheques. He has been indicted, however, for embezzling the proceeds of the cheques. And the difficulty suggested arises from the fact that, instead of cashing the cheques at the bank, the prisoner obtained money for them from friends of his own, who having given him the money, paid the cheques to their own bankers. Now, the prisoner is liable under the statute if he received the money on account of his masters. Mr. Torr ingeniously suggests that he cannot have done so, because the persons who gave him the money knew nothing of his masters. But the question is not whether those persons paid on account of his masters, but whether he re-

(1) Law Rep. 1 C. C. 113.
(2) 9 C. & P. 27.
(3) Dears. Cr. C. 270; 23 L. J. (M.C.) 54.
(4) Dears. & B. Cr. C. 562; 27 L. J. (M.C.) 264.
(5) Dears. Cr. C. 344; 23 L. J. (M.C.) 110.
(6) Law Rep. 2 C. C. 28.
(7) 2 C. & K. 931.
(8) 5 C. & P. 145.

ceived on account of his masters. And he did so because it was his duty to pay over the proceeds at once, in whichever way he received them. It is the same case as if, being on his way to cash the cheques, he had met a friend in the street who cashed them for him, to save him the trouble of going to the bank. The prisoner, then, having received the money on account of his masters, and having dealt with it as he did, with the intention of appropriating it to his own use, was rightly convicted of embezzlement.

LORD COLERIDGE, C.J. I am of the same opinion, and for the same reasons. I will only add that the statute speaks not only of a receipt "for or in the name of" the master, which may contemplate knowledge in the person paying, but also of a receipt "on account" of the master, that is, where the servant is bound to account to the master.

CLEASBY and POLLOCK, BB., and FIELD, J., concurred.

Conviction affirmed.

THE GUARDIANS OF THE POOR OF THE HOLBORN UNION *v.* THE VESTRY OF THE PARISH OF ST. LEONARD, SHOREDITCH.

Nov. 7.

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 42, 125—*Duty created by Statute—Remedy by Action—Neglect to remove Refuse.*

By the Metropolis Management Act, 1855, s. 42, the defendants were constituted a body corporate, with power to sue and liability to be sued. By s. 125, vestries are required to employ a sufficient number of persons, or to contract with any company or persons for removing all dirt, ashes, rubbish, and filth within their parishes. The plaintiffs, the guardians of a union, were possessed of a workhouse situate within the defendants' parish. The defendants refused to remove from it the dirt, ashes, rubbish, and filth there collected; the plaintiffs were in consequence obliged to remove the same and thereby incurred expense:—

Held, that an action was maintainable by the plaintiffs to enable them to recover from the defendants the expense incurred by them in removing the dirt, ashes, rubbish, and filth from the workhouse.

SPECIAL CASE, of which the following are the material portions.

The plaintiffs were the occupiers of and entitled to certain lands, with a workhouse and other buildings thereon, known as the City Road Workhouse, and situate within the parish of St. Leonard, Shoreditch, and of a dust-hole within and under or connected with the workhouse, also situate in that parish.

1876

GUARDIANS OF HOLBORN UNION v. VESTRY OF ST. LEONARD, SHOREDITCH.

On or about the 13th of March, 1875, the defendants gave notice to the plaintiffs that, after the 25th of March, they should cease to remove the dust from the City Road Workhouse.

Accordingly, after the 25th of March, 1875, the defendants ceased and neglected to appoint and employ, or to contract with, any one to remove the dirt, ashes, rubbish, and filth from the dust-hole within and under, or connected with the City Road Workhouse.

On or about the 3rd of May, 1875, the solicitors of the plaintiffs wrote to the defendants' clerk a letter, demanding that the defendants should cause to be removed from the City Road Workhouse the dirt, ashes, rubbish, and filth, pursuant to the Metropolis Management Act, 1855, s. 125.

To this the defendants replied that they considered that the workhouse was, by 48 Geo. 3, c. xcvii., rendered extra-parochial, and that the contractor employed by them had nothing to do with it.

By reason of the premises the plaintiffs were damaged, and obliged to employ persons to remove the dirt, ashes, rubbish, and filth above mentioned, and became liable to pay and paid them for so doing; and the expenses incurred by the plaintiffs in removing the same amounted to 50*l.* 1*s.*

The plaintiffs claimed as damages that amount.

The questions for the opinion of the Court were, first, whether the defendants were bound to appoint and employ a sufficient number of persons, or to contract with any company or persons, for the removal of the dirt, ashes, rubbish, and filth from the dusthole within and under or connected with the City Road Workhouse; secondly, whether the plaintiffs could recover from the defendants the damages sustained by them by reason of the expenses incurred by the plaintiffs in the removal of the dirt, ashes, rubbish, and filth during such time as the defendants had neglected and refused to provide for the removal of the same.

Murphy, Q.C. (*Henry Sutton* with him), for the plaintiffs. The question to be determined in this case is whether an action is maintainable for the failure to perform the duty cast upon the defendants by the Metropolis Management Act, 1855, s. 125. (1) It

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 42, "the vestry of every parish mentioned in schedule (A) to this Act shall be a body corporate by the name of 'The Vestry of the Parish

is submitted that every incident exists necessary to entitle the plaintiffs to have the defendants remove the refuse from the City Road Workhouse. The plaintiffs were occupiers of a messuage

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of , in the County of ;' and every such . . . . vestry shall, by such name . . . . have perpetual succession and a common seal, and shall sue and be sued, and have power and authority (without any licence in mortmain) to take, purchase, and hold land for the purposes of this Act."

Sect. 96: "Every vestry . . . shall, within their parish . . . . (exclusively of any other persons whatsoever) execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities as any surveyor of highways in England is now or may hereafter be invested with, or liable to, by virtue of his office, under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act . . . .; and all streets being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry . . . . under this Act, shall vest in and be under the management and control of the vestry . . . . of the parish . . . . in which such highways are situate."

Sect. 125: "It shall be lawful for every vestry . . . , and they are hereby required, to appoint and employ a sufficient number of persons, or to contract with any company or persons, for the sweeping and cleansing of the several streets within their parish . . . and for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, and for the cleansing out and emptying of privies and cesspools, sewers and drains, in or under houses and places within their parish . . . .; and such company or persons are hereinafter referred to as scavengers; and such scavengers or their servants shall, on such days, and at such hours, and in such manner as the vestry . . . . shall from time to time appoint, sufficiently execute and perform all such works and duties as they respectively are employed or contract to execute or perform; and if any such company or person fail in any respect properly to execute and perform such works and duties, such company or person shall, for every such offence, forfeit a sum not exceeding 5*l*."

Sect. 126: "Any occupier of any house or land, or other person, who refuses or does not permit any soil, dirt, ashes, or filth to be taken away by the scavengers appointed by or contracting with any vestry . . . . as aforesaid, or who obstructs the said scavengers in the performance of their duty, shall for every such offence forfeit and pay a sum not exceeding 5*l*."

Sect. 127: "All dirt, dust, night-soil, ashes, and rubbish collected as aforesaid shall be the property of such vestry . . . .; and such vestry . . . . shall have full power to sell and dispose of the same for the purposes of this Act as they shall think proper; and the person purchasing the same shall have full power to take, carry away, and dispose of the same for his own use, and the money arising from the sale thereof shall be applied towards defraying the expenses of the execution of this Act other than the sewerage expenses."

The parish of the defendants is mentioned in schedule (A) to this Act.

1876

GUARDIANS OF HOLBORN UNION v. VESTRY OF ST. LEONARD, SHOREDITCH.

within the defendants' parish, and were compelled to incur expense in doing what the defendants were bound to perform. The rule is, that where a duty is created by statute, any person damnified by its non-fulfilment has a right of action against the person upon whom the duty has been cast: *Couch* v. *Steel* (1); *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton* (2); *Ruck* v. *Williams* (3); *Brownlow* v. *Metropolitan Board of Works.* (4)

Lanyon (*R. O. B. Lane* with him), for the defendants.

As by 22 Geo. 3, c. 56, and 48 Geo. 3, c. xcvii, the plaintiffs are not liable to be rated to the poor to the same extent as ordinary occupiers (5), the defendants have declined to remove the refuse, under the belief that the plaintiffs stand in a different position from the inhabitants of the parish.

[The Court intimated that this ground of objection to the present action could not be sustained.]

But in any point of view the plaintiffs cannot succeed. By the Metropolis Management Act, 1855, s. 96, the defendants are to execute the duties of surveyors of highways; but a surveyor was not liable to be sued for a neglect to perform the duties of his office: *M'Kinnon* v. *Penson* (6); *Young* v. *Davis* (7); and it has been expressly decided that the same rule applies to vestries incorporated under the Metropolis Management Act, 1855: *Parsons* v. *St. Matthew, Bethnal Green.* (8) The decision in *Pendlebury* v. *Greenhalgh* (9) may at first sight seem to be against the contention for the defendants; but the judgment in that case really turned upon the view taken by the Court of Appeal as to the facts. The object of s. 125 was to improve the sanitary condition of the metropolis; and as it is not alleged that the inmates of the workhouse have suffered in health from the omission to take away the refuse, the plaintiffs have not sustained such an injury as is sufficient to maintain the action: *Gorris* v. *Scott.* (10) The defendants may, perhaps, be compelled to remove the refuse by mandamus or indictment upon the ground that they have failed to perform a duty created by Act of Parliament; but

(1) 3 E. & B. 402; 23 L. J. (Q.B.) 121.
(2) 8 E. & B. 801.
(3) 3 H. & N. 308.
(4) 13 C. B. (N.S.) 768.
(5) *Reg.* v. *St. Leonards, Shoreditch,* 13 Q. B. 964; 19 L. J. (M. C.) 71.
(6) 9 Ex. 609; 23 L. J. (M.C.) 97.
(7) 7 H. & N. 760; 31 L. J. (Ex.) 250; in Ex. Ch. 2 H. & C. 197.
(8) Law Rep. 3 C. P. 56.
(9) 1 Q. B. D. 36.
(10) Law Rep. 9 Ex. 125.

they are not liable to pay damages, for they are a public body acting under statutory powers and fulfilling statutory duties.

[MELLOR, J. As a rule, mandamus does not lie where any other remedy exists; and the defendants will not be exempt from liability on the ground that they have been incorporated by Act of Parliament for public objects: *Mersey Docks Trustees* v. *Gibbs* (1); *Coe* v. *Wise*. (2)]

Murphy, Q.C., in reply. *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (3) is not to be distinguished in principle from the present case.

MELLOR, J. Upon the facts before us, the plaintiffs are entitled to succeed. By s. 42 of the Metropolis Management Act, 1855, the defendants were constituted a body corporate with perpetual succession, a common seal, and a capacity to sue and be sued. It has been contended by their counsel that they cannot be sued in the present action, because, by s. 96, they have the powers, authorities, and duties of surveyors of highways, who cannot be held liable to an action for a failure to perform the duties annexed to their office; but the duties imposed upon vestries and district boards by s. 125 are not analogous to those which surveyors are required to fulfil; the removal of refuse is a part of the work of scavengers, and not of surveyors; and, therefore, it is no answer to the present action that in the capacity of surveyors the defendants are exempt from liability for acts of nonfeasance. The duty is imposed in clear terms, and vestries can enforce penalties by s. 126 against persons obstructing them in the removal of the refuse; and by s. 135, against scavengers neglecting to execute what they have undertaken to fulfil. The defendants appear to have thought that the plaintiffs do not stand in the same position as persons residing within their parish, because the plaintiffs, in pursuance of a statute, are rated at a smaller amount than other occupiers; but this is a matter which we cannot take into consideration. As the legislature has not thought fit to exempt the defendants from liability, it would be unreasonable to hold that the duty cast upon them can be enforced only by indictment or mandamus. I think that the plaintiffs, as guardians of the poor, have sufficient interest in the

(1) Law Rep. 1 H. L. 93. (2) Law Rep. 1 Q. B. 711.
577. (3) Law Rep. 6 Ex. 404.

1876

GUARDIANS OF HOLBORN UNION v. VESTRY OF ST. LEONARD, SHOREDITCH.

removal of the refuse to entitle them to maintain the present suit, for it is their duty to protect the paupers committed to their charge, and to take all measures proper for preserving the health of the inmates of the workhouse.

LUSH, J. I see no analogy between this action and *Parsons* v. *St. Matthew, Bethnal Green.* (1) In that case it was attempted to make the defendants liable for an injury to a horse of the plaintiff, which was occasioned by the omission to repair a highway within their parish. By s. 96 of the Metropolis Management Act, 1855, the duties of surveyors of highways are imposed upon vestries; but this does not render them responsible to a person injured by the non-repair of a street; and the statute has not created a general liability to pay damages if the highways are suffered to fall into a dangerous condition. I think the decision in that case clearly right under the words of s. 96. But by s. 125 a specific duty has been created to be discharged by vestries towards the inhabitants of their parishes; and this course has been taken by the legislature for the prevention of those nuisances which any householder may create by allowing filth to accumulate. The defendants, as the vestry of the parish, were bound to clear away the dirt and rubbish of the inhabitants, and the plaintiffs enjoy, at least in this respect, the same rights as persons residing within the parish. Sect. 127 enacts that any profit arising from the sale of the refuse is to go to the defendants, and this was, no doubt, intended as some compensation for the expense incurred in the performance of the duty imposed upon them. The defendants are a body corporate, with power to sue and liability to be sued; and, consequently, as against them, there is no ground for applying the reason in pursuance of which a fluctuating body like parishioners cannot be sued. The suit, therefore, is maintainable, if the plaintiffs have suffered damage, and it is found in the case that, in order to remove the refuse, the plaintiffs have been compelled to incur expense; this is sufficient to support the action.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *James, Curtis, & James.*
Solicitors for defendants: *Mills & Lockyer.*

(1) Law Rep. 3 C. P. 56.

THE QUEEN, ON THE PROSECUTION OF JAMES BAXTER AND HENRY JOHN, *v.* THE GREAT NORTHERN RAILWAY COMPANY. 1876 *Nov.* 8.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 121—*Compensation—Procedure—Tenant for Residue of a Term having less than one Year to run.*

By the Lands Clauses Consolidation Act, 1845, s. 68, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works," he may have compensation for the same "settled either by arbitration or by the verdict of a jury, as he shall think fit." By s. 121, if any lands required for the purposes of the special Act "shall be in the possession of any person having no greater interest therein than as a tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein," he shall be entitled to compensation, to be "determined by two justices in case the parties differ about the same."

The prosecutors were tenants of certain land, which they held for a term of two years; the defendants took possession under the provisions of the Lands Clauses Consolidation Act, 1845. At the time when possession of the land was taken by the defendants, the unexpired residue of the prosecutors' term was less than one year; they commenced proceedings under s. 68 to obtain compensation by arbitration:—

Held, that the prosecutors were persons "having no greater interest . . . than as a tenant for a year or from year to year" within the meaning of s. 121; and that they ought to have taken proceedings before justices in order to determine the amount of compensation payable to them; and that they could not obtain compensation under s. 68.

SPECIAL CASE upon writ of mandamus to take up an award. The following were the material facts:—

By an agreement in writing, dated the 14th of August, 1871, J. T. Armston let to the prosecutors a piece of land for the term of one year from the 10th of August, at the rent of 20*l*. And it was further agreed that if the prosecutors "shall be desirous of continuing the tenancy for a further two years, J. T. Armston will guarantee to let them have premises," &c. This agreement was signed by Armston. The prosecutors forthwith entered upon the land and erected for the purposes of their business a lime shed, a cement shed, and a workshop. In December, 1871, the defendants (intending to apply to Parliament in its next session for powers to take land) served on the prosecutors the customary notice of

1876

THE QUEEN v. GREAT NORTHERN RAILWAY CO.

their intended application. The defendants did so apply to Parliament, and were, by s. 10 of the Great Northern Railway (Various Powers) Act, 1872 (35 & 36 Vict. c. cxxviii.), amongst other things, authorized and empowered to make certain lines of railway, and by s. 2 of that statute the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, and the Railways Clauses Consolidation Act, 1845, were, amongst other statutes, except where expressly varied by the defendants' Act, incorporated therewith. The prosecutors continued to occupy the land, and shortly after the 1st of August, 1872, they had an interview with Armston, and told him that they desired to continue the tenancy for the further two years mentioned in the agreement. After some negotiation, this was assented to by Armston, and the prosecutors continued to occupy the land until the 28th of August, 1873, and paid Armston the agreed rent for it up to the 10th of August, 1873. On the 21st of March, 1873, the defendants, in pursuance of the provisions of their Act above mentioned and the Acts incorporated therewith, handed to Armston at the office of the prosecutors for the prosecutors, who were not then on the premises, the usual notices to treat addressed to them respectively. Armston did not hand the notices to either of the prosecutors, nor communicate to either of them that the same had been handed to him. On the 13th of August, 1873, a contractor in the employ of the defendants and their inspector of works, with a number of workmen, came on the land and threw down on to it the wall which divided it from the defendants' railway and which belonged to the defendants, and then commenced to cart away the bricks and to bring clay and materials for the foundation of the new line of railway about to be constructed by the defendants under their Various Powers Act, 1872. Upon the 21st of August the prosecutors sent written notice to the defendants that they claimed compensation in respect of the land which they had occupied. The notice described the prosecutors as occupying "under an agreement dated the 14th day of August, 1871, made between John Thomas Armston of the one part, and ourselves of the other part, whereby the said John Thomas Armston let to us the said land and premises for a term which will expire on the 10th day of August, 1874, at and subject to a

rent of 20*l.* per annum." The sum demanded as compensation was 631*l.* 10*s.*, and the prosecutors gave notice that they desired to proceed by arbitration if that amount were not paid by the defendants. The land occupied by prosecutors having been rendered, by the works carried on upon it by the defendants, unfit for carrying on the business of the prosecutors, they finally left the same on the 28th of August, 1873. On the 11th of September, 1873, the defendants served a notice on the prosecutors appointing an arbitrator under protest. On the 15th of September the prosecutors served a notice upon the defendants appointing an arbitrator. The arbitrators did not appoint an umpire, and the Board of Trade, at the instance of the prosecutors, appointed an umpire. The reference was held before the umpire on the 27th of January, 1874, when the prosecutors and the defendants (under protest) respectively appeared; and the umpire subsequently made his award, which the defendants refused to take up.

The Court was to have power to draw inferences of fact.

The question for the opinion of the Court was whether, under the above circumstances, the defendants ought to have taken up the award.

Philbrick, Q.C. (*Reginald Brown* with him), for the prosecutors. Two questions arise in the present case: first, what interest had the prosecutors in the land let to them? secondly, have they taken the proper course to obtain compensation? for it is not now contended that if the prosecutors had no interest, the defendants were bound to take up the award. As to the first question, it is plain that, according to the terms of the agreement, dated the 14th of August, 1871, the prosecutors were at first tenants for one year and afterwards for two years, which period would have expired upon the 10th of August, 1874, if their occupation had not been interrupted by the defendants. The effect of a notice to treat under the Lands Clauses Consolidation Act, 1845, is to establish the relation of vendor and purchaser, and this cannot afterwards be altered. In the present case the notice to treat was delivered at the prosecutors' office for their use on the 21st of March, 1873; the respective rights of the parties were then fixed, and at that time one year and almost five months of the term of two years,

1876

THE QUEEN v. GREAT NORTHERN RAILWAY CO.

commencing the 10th of August, 1872, remained unexpired; therefore at that date the prosecutors had an interest greater than that of a tenant for a year or from year to year.

[LUSH, J. The notices did not reach the prosecutors, who consequently were not bound thereby; the service was informal, for the requirements of s. 19 (1) were not complied with: the notices were not served personally, nor were they left at the

(1) By the Lands Clauses Consolidation Act, 1845, s. 19, "All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any . . . lands" authorized to be taken "shall either be served personally on such parties or left at their last usual place of abode, if any such can, after diligent inquiry, be found, and in case any such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, shall also be left with the occupier of such lands, or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands."

Sect. 68: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled, either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein."

By s. 89 penalties are imposed upon the promoters of the undertaking if they or their contractors enter upon lands required for the purposes of the special Act contrary to the provisions of the Lands Clauses Consolidation Act, 1845.

Sect. 121: "If any such lands shall be in the possession of any person having no greater interest therein than as a tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such funds in their possession required for the purposes of the special Act."

prosecutors' last usual place of abode, and there was no "diligent inquiry;" and if the prosecutors were not bound the defendants were not; for in order that the notice should be valid, it was necessary that it should operate against both parties. The proper date for ascertaining the rights of the prosecutors and the defendants is the 13th of August, 1873, when the latter entered upon the land; the unexpired residue of the term then vested in the prosecutors was one year less three days.]

In that view of the facts the defendants entered as trespassers, and were liable to a penalty under s. 89. As to the second question, the prosecutors have proceeded under s. 68, and this, it is submitted, was the correct course to pursue; the defendants allege that the proper mode of obtaining compensation in the present case was that pointed out by s. 121; but that enactment is inapplicable, for it extends only to yearly tenants and tenants for a year, whereas the prosecutors were, on the 13th of August, 1873, tenants for the residue of a term of at least two years, and therefore had, in point of law, a greater interest.

[LUSH, J. That proposition seems hardly sustainable; for if notice to quit be not given at the proper time, a tenant from year to year has an interest longer by several months than the prosecutors had upon the 13th of August, 1873. Moreover, a tenant from year to year who, as often happens, is not likely to be served with a notice to quit, is in no worse position than a tenant for the residue of a term with the probability that his lease will be renewed at its expiration.]

The operation of s. 121 ought not to be increased by judicial interpretation, for the legislature probably intended it to be applied only in cases where insignificant claims are made; here the prosecutors claim a considerable amount, for they were interrupted in the trade which they were carrying on.

[LUSH, J. Can any kind of damage be suggested for which a tenant will be unable to obtain compensation under s. 121?]

A tenant is not entitled to compensation under that enactment until possession of his land is required, even although his holding may have been rendered precarious and unmarketable by a notice to treat: *Reg.* v. *Stone.* (1)

(1) Law Rep. 1 Q. B. 529.

1876

THE QUEEN v. GREAT NORTHERN RAILWAY CO.

W. G. Harrison, for the defendants, was not called upon to argue.

MELLOR, J. It is unnecessary to hear any argument for the defendants. We are agreed that the prosecutors ought to have proceeded under s. 121. The object of this enactment was to prevent claims arising out of interests of short duration from being heard by any tribunal other than that of justices. The legislature thought that claims of this kind, being from their nature for comparatively small amounts, need not go before either a jury or arbitrators, and that they might be satisfactorily and cheaply disposed of before justices. The facts in the present case fall within the provisions of s. 121.

LUSH, J. I am entirely of the same opinion. I do not feel any hesitation as to the proper construction of the statute. Applying the ordinary rules of interpretation to s. 121, I cannot entertain the slightest doubt that it was meant to comprehend every species of interest being for less than a year in duration. I think that this is plainly indicated by the words, "having no greater interest therein than as a tenant for a year or from year to year." No instance has been suggested to us in which a tenant for the residue of a term having less than one year to run at the time when possession of his land is required, might be entitled by law to receive compensation, and yet would be unable to obtain it under s. 121. Justices are empowered to award to such a tenant as is comprehended within the section "compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, or for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same." These words are wide enough to include every kind of damage or loss which the prosecutors can have suffered.

Judgment for the defendants.

Solicitor for prosecutors: *Vant.*

Solicitors for defendants: *Johnston, Farquhar, & Leech.*

[CROWN CASE RESERVED.]

1876
Nov. 18.

THE QUEEN *v.* TATLOCK.

Misappropriation by Agent—24 & 25 *Vict. c.* 96, *s.* 75.

The prisoner was indicted under the second branch of 24 & 25 Vict. c. 96, s. 75, for that he being entrusted, as a broker, attorney, or agent, with valuable securities for a special purpose, without authority to sell, negotiate, transfer, or pledge them, unlawfully and contrary to the purpose for which the securities were entrusted, converted to his own use a part of the proceeds. The facts proved were as follows:—The prisoner was an insurance broker, and had, as such, effected insurances on a ship for the prosecutor; and the ship having been lost, the prosecutor sent him the policies, three in number, one with the A. office, one with the I. office, and one with underwriters, with other documents necessary for recovering the loss. On the 17th of December, the prisoner received the amount of the I. office's policy, and on the 31st of December, the amount of the A. office's policy. Each amount was paid him by a cheque to his own order, which in each case he paid into his own bank to his own credit. The prisoner did not pay over to the prosecutor any of the money so received by him; but, being pressed for it, gave various excuses for not doing so. On the 27th of January following, he filed a petition for liquidation; and his balance at his bank was then much less than the sum received on the policies. The prisoner having been convicted on these facts:—

Held (by Cockburn, C.J., Kelly, C.B., Bramwell and Amphlett, JJ.A., Pollock, B., and Field, J.), that the conviction was wrong.

By Cockburn, C.J., on the ground that, even assuming the prisoner could have been properly convicted if there had been evidence that the prisoner had received the money with the intention of embezzling it, in the absence of such evidence and a finding to that effect, he could not be convicted.

By Kelly, C.B., and Pollock, B., on the ground that, in the absence of evidence of the previous course of dealing between the parties, and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld.

By Bramwell and Amphlett, JJ.A., and Field, J., on the ground that the branch of the section in question applies only to the case of an agent, entrusted with securities without authority to obtain money upon them, who wrongfully appropriates the securities, or wrongfully obtains money upon them and appropriates the money; following *Reg.* v. *Cooper* (Law Rep. 2 C. C. 123).

CASE reserved by a learned commissioner sitting at the Old Bailey.

At the session of the Central Criminal Court, held on Monday, the 21st of February, 1876, the prisoner was tried upon an indictment, the second count of which was founded on the second branch of the 75th section of the statute 24 & 25 Vict. c. 96, and was as follows:—

1876

THE QUEEN v. TATLOCK.

2nd count. And the jurors, &c., that the said William Ananias Crage, trading under the style and firm of Overall, Sons, & Co., heretofore to wit, on the 27th day of November, 1875, within the jurisdiction of the said Central Criminal Court, did entrust the said William Thomas Augustus Tatlock, as his broker, attorney, and agent, with certain valuable securities, to wit, two policies of insurance for 650*l.* and 500*l.* respectively for a special purpose, that is to say, that he, the said W. T. A. Tatlock, should receive the said sums of 650*l.* and 500*l.*, which were then due and payable on the said policies of insurances, and forthwith pay over to the said W. A. Crage the sum of 1138*l.* 10*s.*, without any authority to him, the said W. T. A. Tatlock, to sell, negotiate, transfer, or pledge the said valuable securities. And the jurors, aforesaid, upon their oath, aforesaid, do say that the said W. T. A. Tatlock, being a broker, attorney, and agent, as aforesaid, on the day and year aforesaid, and within the jurisdiction aforesaid, in violation of good faith and contrary to the said object and purpose for which the said valuable securities were entrusted to the said W. T. A. Tatlock, as aforesaid, unlawfully did convert to his own use and benefit a certain part of the proceeds of the said valuable securities, to wit, the said sum of 1138*l.* 10*s.*, contrary to the form of the statute, &c., and against the peace, &c.

The facts adduced in evidence were these:—

The prisoner was an insurance broker in the city of London, trading as "Tatlock, Brothers," and in November, 1875, was employed by W. A. Crage (trading under the style of S. Overall, Sons, & Co.) to effect for him (Crage) an insurance on the cargo of a ship called the *Agatha*, to the extent of 1650*l.* The prisoner was to pay the necessary premium. He delivered to Crage the following memorandum:—

"Tatlock Brothers, "London, November 17, 1875.

To Messrs. Overall, Sons, & Co.

Dr. to Insurance for £1650 on *Agatha* at 30/ per cent.	24	15	0
Duty	0	4	3
	24	19	3
Less 10 per cent. discount for cash on £23 10 3 .	2	7	0
	£22	12	3

Tatlock Brothers."

1876

THE QUEEN v. TATLOCK.

On the 27th of November, prisoner was at Crage's counting-house, and Crage's clerk said to him, "By-the-bye, Mr. Tatlock, we have an account due to you" (alluding to the above). Prisoner replied, "Oh, never mind that, I shall have to give you a cheque presently." The loss of the *Agatha* was by this time known. The clerk in consequence of this statement by the prisoner did not give him a cheque for the amount of the premium. On the 27th of November, 1875, Crage having heard of the loss of the *Agatha*, gave the prisoner directions to obtain the money on the policies, and wrote to him as follows:—

"London, November 27, 1875.

"102, Lower Thames Street.

"Gentlemen,—Herewith we hand you the necessary documents for recovering the amount insured on *Agatha*, Lerwick, and list of same, which please sign and return to bearer.

"We are, gentlemen, yours truly,

"Messrs. Tatlock Brothers." "S. Overall, Sons, & Co."

With that letter Crage sent to prisoner and prisoner received three policies of insurance for the sums of 650*l.*, in the Archangel office, 500*l.* in the Imperial office, and 500*l.* by underwriters, the captain's protest and bill of lading, and a letter from Lloyd's agent.

On the 17th of December the prisoner received from the Imperial office the 500*l.* on their policy by a cheque payable to his order, and he paid that cheque into his own bank, the Union, to his own credit, and it was cashed and credited to him.

On the 31st of December the prisoner received from the Archangel office the 650*l.* on their policy by a cheque payable to his order, and he paid that cheque into his own bank to his own credit, and it was cashed and credited to him.

On the 11th of January, 1876, prisoner wrote and sent to Crage the following memorandum:—

"London, January 10, 1876.

"From Tatlock Brothers.

Cr.

By total loss per *Agatha* . .	£1650	0	0
Less commission receiving .	16	10	0
	1633	10	0

1876

THE QUEEN v. TATLOCK.

Due the 17th of January, 1876.

Subject to payment by underwriter.

"Tatlock Brothers.

"To Messrs. S. Overall, Sons, & Co."

Crage called on prisoner twice for the money, and the prisoner said it was not due until the 17th of January. Again, on the 18th, Crage called upon him and asked for the money, and prisoner said he could not let him have it at present, but should be able to let him have it on Saturday, or some of it.

On the 19th prisoner went to Crage and said he could not get the money till Saturday, and would let Crage know on the following Thursday how much he (prisoner) could get by Saturday. On the 20th of January prisoner wrote and sent to Crage the following memorandum :—

"London, January 20, 1876.

"From Tatlock Brothers.

"Dear Sir,— *Agatha.*

"We fear that we shall be unable to exceed 1000*l.* upon the loss per the above-named vessel on Saturday next.

"Yours truly, Tatlock Brothers.

"To Messrs. S. Overall, Sons, & Co."

Upon receipt of that memorandum Crage called upon prisoner for the money, who said, "It would be impossible for a broker to carry on his business if he had to pay immediately." Crage replied, "Having had the money, as I presume you have, you should pay it at once. You have no business to withhold it. Let me see the policies." Prisoner thereupon went to a safe and rummaged it, and then said, "I have not the policies, the office has kept them." Crage replied, "The office would not have kept them unless they had paid for them." The prisoner said, "Two of the offices have settled with me in account," and the prisoner then handed to Crage one of the three, namely, the underwriters' policy for 500*l.*, and Crage himself obtained the money on that policy.

The prisoner never paid Crage any money, and on the 27th of January, 1876, he filed his petition for liquidation with a statement of debts, 2500*l.*, and returned Crage as a creditor for 1112*l.* 5*s.* 11*d.* The trustee under the prisoner's liquidation received the balance (about 600*l.*) standing to the credit of the

prisoner at the Union Bank, and five creditors only have proved under the liquidation. The prisoner's discharge under the liquidation was granted. Mr. Crage did not prove, and repudiated the liquidation altogether.

It was contended by Mr. Straight, on behalf of the prisoner, that the facts as proved did not shew the prisoner to have committed the offence mentioned in the statute, and that the commissioner ought so to tell the jury. He, however, laid the facts before the jury, and asked them the following questions:—

1. Did Crage entrust the prisoner with the two policies of insurance?

2. Did he entrust him with them for a special purpose?

3. Was that special purpose that he should receive the moneys and forthwith pay over the moneys when received to Crage?

4. Had the prisoner any authority to sell, negotiate, transfer, or pledge them?

5. Did he, in violation of good faith and contrary to the purpose for which they were entrusted to him, convert any part of the proceeds to his own use?

The jury answered questions 1, 2, 3, and 5 in the affirmative, and No. 4 in the negative, and under the commissioner's direction they found the prisoner guilty, and the verdict was so recorded.

The question reserved for the consideration of the Court above was, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the learned commissioner ought to have directed the jury to find a verdict of not guilty.

May 27. The case was argued before Kelly, C.B., Quain, Archibald, and Field, JJ., and Pollock, B., by *Straight* for the prisoner and *Tickell* for the prosecution.

June 24. The case was re-argued before Cockburn, C.J., Kelly, C.B., Bramwell, Pollock, and Amphlett, BB., Archibald and Field, JJ., by *Straight*, for the prisoner, and *Besley* (*Tickell* with him), for the prosecution. *Reg.* v. *Cooper* (1) was cited. The arguments sufficiently appear from the judgments.

Cur. adv. vult.

(1) Law Rep. 2 C. C. 123.

1876

THE QUEEN v. TATLOCK.

Nov. 18. The following judgments were delivered:—

COCKBURN, C.J. The defendant was indicted under the 75th section of 24 & 25 Vict. c. 96. The facts were as follows:—Having negotiated, as broker, certain policies of insurance on a ship belonging to the prosecutor, and the ship having been lost, the defendant was entrusted with the policies for the purposes of collecting the amounts due upon them. These he received in cheques to his own order, which he indorsed and paid into his own bankers, to his own credit; but he failed, either then or at any time afterwards, to pay the amount to the prosecutor, and two months later filed a petition for liquidation. The jury, in answer to questions specifically put to them by the learned commissioner before whom the case was tried, found expressly that the prisoner was entrusted with the policies for a special purpose, namely, that he should receive, and when received forthwith pay over the moneys to the prosecutors. They further found that the prisoner had no authority to sell, negotiate, transfer, or pledge the policies; and that, in violation of good faith, and contrary to the purpose for which they were entrusted to him, he converted the proceeds to his own use. Upon which they were directed by the learned commissioner to find the prisoner guilty. The question submitted to us is, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the jury should have been directed to find a verdict of not guilty.

It appears to me plain that there has been a miscarriage in this case. But I scarcely know in what position we are placed as to the decision we can pronounce; whether our opinion is asked upon the facts as found by the jury, or on the facts as proved by the evidence; it being to my mind perfectly plain, not only that the right questions have not been put to the jury, but also that their answers to the questions as put are directly contrary to the evidence. The proper remedy would be for a new trial; but that we have no authority to direct. I think, however, that the form in which the question is put leaves it open to say whether the learned commissioner, instead of putting any questions to the jury, should not, upon the evidence, have directed them to acquit the prisoner; and this, I think, would have been the proper course, the evidence being, in my opinion, insufficient to warrant a conviction.

The case turns on the construction of the second branch of the section referred to, which enacts that "whosoever having been entrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel, or valuable security, or any power of attorney, for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or of any foreign state, or in any stock or fund of any body corporate, company, or society for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or to the use or benefit of any person other than the person by whom he shall have been so entrusted, such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor."

I entertain very serious doubt whether a policy of insurance comes within this section. The term "chattel" is intended, I think, to apply to objects which can be sold, bartered, or pledged; and a policy of insurance cannot be said to be a "valuable security," any more than a contract of sale or any other contract. It is simply a contract whereby, in consideration of a premium, one party insures another against a given loss. Unless the loss occurs nothing is payable. A valuable security is one on which money is payable irrespective of any contingency. Moreover, a policy of insurance upon which money is received is neither "sold," "negotiated," "transferred," nor "pledged," in any sense of the word. The money due on it is paid, and the contract comes to an end, just as when money is paid on a contract of sale.

I likewise entertain very serious doubts whether this enactment extends to a case in which a person entrusted with any of the instruments enumerated in the section, for the purpose of disposing of it, or receiving money on it, having done so, embezzles the proceeds. The enactment, if the words are carefully followed, appears to me to apply solely to the dealing with securities without authority, and contrary to the purpose for which they were entrusted,

1876

THE QUEEN v. TATLOCK.

and in so doing converting the instrument, or the proceeds of it, to the use of the party so violating his trust. But here, the party uses the instrument for the very purpose for which it was entrusted to him, namely, that of receiving the money due on it. Let us assume, for the purpose of the argument, that he afterwards embezzles the money. He still cannot be said to have dealt with the policy "without authority," which, by the express terms of the statute, is an essential element of the offence.

It may, however, be said that, if an instrument is entrusted to a person for the purpose of his receiving money upon it and handing over the money so received to the principal, he receives it for a "special purpose;" and that if the agent receives such money with the intention of applying it to his own use, instead of handing it over to the person employing him—the authority being vitiated by the intended fraud—he is acting without authority, as well as in violation of good faith.

Assuming this to be so, and that a party receiving money on an instrument entrusted to him for the special purpose of his receiving the money due upon it, and forthwith handing such money over in specie, and who, at the time he receives the money intends, in violation of good faith, to apply it to his own use, commits the offence created by the statute. I doubt exceedingly whether that would be so, where, the money having been received with an honest intention, the fraudulent design of misappropriating it afterwards arose. If this doubt be well founded, it would be a question for the jury, whether the defendant, at the time he received the money, intended to appropriate it to his own purposes—a question which was not submitted to the jury in the present case.

At all events, it is to my mind perfectly clear that unless there was, at the time the money was received, the fraudulent intention of keeping the money, in which case the statute may possibly apply, it cannot apply to a case in which, by the understanding of the parties, the person receiving the money is not to hand it over at once to the principal, but is to carry it to an account between them, and to pay it only in settlement of such account. That such was the understanding between the prosecutors and the defendants—whether as arising from the general custom of trade,

as between the insurance brokers and their principals, or from the course of dealing between these immediate parties,—appears to me to result from the evidence. No evidence having been given as to any general custom, I do not think we are at liberty to take notice of the statement of such a custom occurring in any work on insurance law, but sufficient evidence of the understanding between the parties is to be found in the fact that when the defendant is applied to for the money received on the policies, he answers, while acknowledging the receipt, that it will not be due to the prosecutor for a month, and this is acquiesced in, affording, as it seems to me, at all events primâ facie—and no evidence was offered on the part of the prosecution to rebut the presumption—good ground to infer that the defendant, either by the custom of business, or the course of dealing between himself and his principals, was entitled, instead of paying over the money at once, to hold it and treat it as his own for a time, settling for it only in account when the time for settlement came. If such were not the terms on which the defendant was employed, it was for the prosecution to rebut the inference which arises from the facts I have referred to.

Assuming such a case to be within the statute, it would be a question for the jury whether the defendant, at the time the money was received, intended to embezzle it. Possibly proof that a party receiving money under such circumstances was, and knew himself to be, hopelessly insolvent, and, being aware that his account at his bankers was heavily overdrawn, paid the money in to the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to convert the proceeds to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that, two months after the receipt of the money, the defendant filed a petition for liquidation. At the time he received it he may have been solvent. It was for the prosecution to give evidence as to the state of his circumstances, if it could be shewn that he was insolvent when the money was received, so as to raise the inference that, in paying it into his bankers, he intended to

1876

THE QUEEN v. TATLOCK.

defraud the prosecutor of the amount. No such evidence having been given, I think that, even supposing the case to be within the statute, as to which I entertain great doubt, the learned commissioner should have held that there was no case to go to the jury, and should have directed an acquittal. I am therefore of opinion that the conviction was wrong, and should be quashed.

KELLY, C.B. I think it is so far doubtful whether a marine policy of insurance, upon which a loss has occurred and a sum of money has become payable, is a chattel or a valuable security within the meaning of the 75th section of the Act, that I do not feel justified in dissenting from the judgment of acquittal upon which the other members of the Court have agreed. In addition, however, to the judgment of Baron Pollock, in which I entirely concur, I would observe that I cannot accede to the doctrine that because a man, whose duty it is to pay over a sum of money to another, pays it into his bankers, and afterwards draws it out by cheque, and then goes into liquidation or becomes bankrupt, he may not have been guilty of a criminal offence within this statute, or of what, under other circumstances, would have amounted to embezzlement. It appears to me that if the prisoner, after he had received the money and ought to have paid it to the prosecutor, and after paying it into his bankers, drew it out again, knowing that he was insolvent, and applied it to his own uses, knowing that he could never make it good, he was guilty of fraudulently converting the proceeds of the policy to his own use within the meaning of the statute, and that if the policy had clearly been a chattel within the statute, the conviction would have been right; but, for the reasons already stated, I agree that it should be quashed.

AMPHLETT, B. I am of opinion that the conviction must be quashed.

The indictment is framed upon the second branch of the 75th section of 24 & 25 Vict. c. 96, and the case alleged against the defendant is, that, being entrusted as a broker with certain ship policies, for the special purpose of receiving the moneys due thereon and paying over the same forthwith to the prosecutor, he fraudulently converted the same to his own use.

Now, looking at both branches of the section, which we ought to do, for the purpose of arriving at the true meaning of either, it appears to me that the second branch only deals with the case of chattels and securities, sold or converted into money without authority, and does not embrace in its provisions policies like these, which were entrusted to the defendant for collection.

For we must observe that the section only relates to certain classes of agents whom the legislature has not thought fit to make amenable to the ordinary law of embezzlement, and it is only, therefore, under defined conditions and safeguards that such agents can be proceeded against criminally for misappropriating moneys or securities entrusted to them.

The general scheme appears to be this.

If moneys, or securities which they are authorized to convert into money, are entrusted to agents of this character, they are only answerable criminally for a fraudulent misappropriation, if a direction in writing as to the disposal of such moneys was given. That is provided for by the first branch of the section which embraces the case we are considering, for I cannot doubt, having regard to the interpretation clause, that the policies were securities for the payment of money within the meaning of the section.

There remained the case (which was supposed to require the protection of the criminal law) of chattels or securities entrusted to such agents for safe custody, or for some special purpose, without authority to sell or convert into money, and that is provided for by the second branch of the section, which makes such agents criminally liable for a fraudulent misappropriation of such last-mentioned chattels or securities, or of the proceeds of the same. It has been argued that these last words can have no meaning unless they are held to refer to securities other than those which they had no authority to convert into money.

I think this is a mistake. These words are not to be found in the first Act (52 Geo. 3, c. 63) on this subject, but were inserted in the subsequent Acts for the obvious purpose, as it appears to me, of meeting the case, which may well happen, of such agent selling, or at all events alleging that he had sold, honestly, though without authority and afterwards yielding to temptation, and fraudulently converting the proceeds to his own use. Without these

1876

THE QUEEN v. TATLOCK.

words the agent in such a case would escape, or it might, at all events, be more difficult to convict him.

The irrational consequences that might occur if securities dealt with by the first were also held to be comprised in the second branch of the section, are numerous, and, as it appears to me, afford a strong argument that it was not so intended by the legislature. For instance, if you gave such an agent money for a particular purpose, but not expressed in writing, he would not be criminally responsible, but if you had given him a cheque, and told him verbally to get it cashed and apply the proceeds in the same way, he would. What is the sense or meaning of such a distinction? Is he not, as soon as he cashes the cheque, entrusted with the amount exactly in the same way as if it had been handed over to him directly by his principal?

Again, it is admitted on all hands that if a debenture or other security be entrusted to a broker with authority to sell, negotiate, transfer, or pledge, the case would not be within the second branch of the section; and that, in the absence of a written direction as to the disposal of the proceeds, he would be civilly only, and not criminally, responsible; but, according to the argument, if the security were entrusted to him for the purpose of collecting the money due upon it, he would be criminally responsible for the misapplication of the proceeds. I confess I cannot see any reason why he should be criminally responsible in one case but not in the other.

It is certainly difficult to bring a broker so authorized to collect moneys due on a security within the description of an agent authorized to sell, negotiate, transfer, or pledge, although I think there is little doubt but that the framers of the section, by the use of the latter words, imagined that they had exhausted every means of converting securities into money. I do not, however, think it necessary to deal with that difficulty, since my judgment is based not upon subtleties of language, but upon the broad ground that, according to the true construction of the section, cases which, if there had been a written direction, would have fallen within the first branch, do not, in the absence of such written direction, fall within the second branch of the section. In fact, I think that the cardinal principle of the section is that such an agent is only (in

the absence of a written direction) to be criminally responsible for moneys which may come into his hands by some unauthorized act of his own.

This construction of the section was adopted and formed the ground of an unanimous decision of the Court of Appeal, consisting of five judges, in *Reg.* v. *Cooper* (1), and I think we are bound by that authority, even if it be the fact, as is alleged, that there was another ground, unnoticed by the counsel who argued or the judges who decided that case, which might have supported the decision.

Upon the other point argued before us, as to the sufficiency of the evidence, in point of fact, to support the conviction, I will only say that I find it very difficult to understand what, if anything, the learned judge has referred to us beyond the legal question on which I have already expressed my opinion. If he meant to ask us whether the facts stated in the case justified the findings of the jury, I should say they did not, for I can find in the facts, as stated, no evidence at all of the special purpose stated in the indictment, and consequently none of the alleged conversion.

BRAMWELL, B. I am of opinion, for the reasons given in Sir R. Amphlett's judgment, that these policies were not valuable securities entrusted to the prisoner for a special purpose within the meaning of the second part of s. 75, but were securities for money within the first part of the section, and were entrusted to the prisoner for such purpose as to make the case within the first part had there been a direction in writing. As there was none, the conviction cannot be sustained.

POLLOCK, B. In so far as the decision of this case depends upon the proper construction to be put upon the section of the statute under which the prisoner was indicted, the 24 & 25 Vict. c. 96, s. 75, I entertained during the argument, and still entertain, considerable doubt. I have had, however, the advantage of seeing the judgments which have been prepared by my learned Brethren, and thinking, as I do, that the conviction was unsatisfactory, for reasons to which I will presently refer, I am not prepared to differ

(1) Law Rep. 2 C. C. 123.

1876

THE QUEEN v. TATLOCK.

with the view which has been taken by the majority of the Court upon the construction of a statute which is undoubtedly capable of more than one interpretation. If it could be assumed that the construction of the statute which was insisted upon by the prosecution was correct, it appears to me that, having reference to the duty of the prisoner to pay over to the prosecutor the sums of money which he had received in payment of the policies, and also to the false statement made by the prisoner to the prosecutor after he had received these sums, there may have been evidence which might and ought to have been submitted to the jury with a view to their finding whether or no the prisoner, who undoubtedly had received the money, "converted it to his own use or benefit" within the meaning of the statute. But the prisoner was not a mere clerk of the prosecutor; he was an insurance broker carrying on an independent business, and it must be assumed that he had many other principals for whom he acted besides the prosecutor, and it does not appear what had been the previous course of dealing between the prosecutor and the prisoner as to the payment or accounting by the latter for money received by him on the settlement of losses. These are matters having an essential bearing upon the guilt or innocence of the prisoner, and yet they do not appear to have been explained by the evidence or brought to the attention of the jury, who, by their answer to the third question, appear to have assumed that the duty of the prisoner was to pay over the money forthwith, without having their attention called to, or having entered on the consideration of, the facts from which such a duty could be properly inferred. Under these circumstances, when I have to answer the question which has been submitted to us by the learned commissioner, I cannot say that I consider that the facts, as proved, were sufficient to constitute the offence mentioned in the statute, and therefore, in my judgment, the conviction should be quashed.

Conviction quashed.

Solicitors for prosecution: *Beard & Son.*
Solicitor for prisoner: *H. Montagu.*

[IN THE COURT OF APPEAL.]

1877
Jan. 11.

BAKER *v.* OAKES.

Practice—Costs—Jurisdiction of Judge who tried Action—Judge at Chambers—Order LV.; Order LVII., Rule 6—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 39.

By Order LV., where an action is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action is tried or the Court shall otherwise order. By Order LVII., Rule 6, a Court or a judge shall have power to enlarge the time appointed by these rules for doing any act. By s. 39 of the Judicature Act, 1873, any judge of the High Court may exercise any jurisdiction of the Court exercised before the Act by a judge at chambers. A jury returned a verdict for a small amount beyond a sum paid into court; no application as to costs was made at the trial; but some time afterwards the judge who tried the action, sitting at chambers, made an order depriving the plaintiff of costs from the time of the payment into court. On appeal, the Divisional Court set aside the order for want of jurisdiction. On appeal to the Court of Appeal:—

Held, that the judge had no jurisdiction: Either, 1. As the judge who tried the action, because no application had been made at the trial as required by Order LV.; and Order LVII., Rule 6, did not apply to the case. Or, 2. As the judge at chambers, because Order LV. expressly confined the power to the Court, and s. 39 did not apply, as no such power existed before the Act.

THIS action was brought for 127*l.* 15*s.*, consisting of three items of claim, 61*l.* 15*s.* and interest, 6*l.*, and 60*l.* As to the first item, the defendant paid 62*l.* 10*s.* into court, which plaintiff took out in satisfaction, never indebted being pleaded to the rest. At the trial before Huddleston, B., on the 1st of August, 1876, the defendant succeeded as to the item of 60*l.*, but upon the item of claim of 6*l.*, the plaintiff obtained a verdict for 4*l.* 6*s.*, made up of two items of 2*l.* 7*s.* and 1*l.* 19*s.* At the trial nothing was said as to costs.

A stay of execution was obtained, and application was made to the Court on the the 5th of November for a new trial on an affidavit setting out the following facts: A few days after the trial a witness for the plaintiff, who had sworn at the trial that the 2*l.* 7*s.* was still owing, discovered, on examining the accounts, that it had been paid, and wrote to the defendant to that effect. The form of particulars had misled the defendant as to the other item of 1*l.* 19*s.*,

1877

BAKER v. OAKES.

or he would have been prepared at the trial to prove the payment of that also, or have paid the amount into court.

The Court refused the application on the ground of the small amount, but suggested that an application might be made as to costs.

An application, on the same affidavit, was accordingly made to a judge at chambers, which was referred to Huddleston, B.; and he made an order on the 15th of November that "plaintiff's costs subsequent to the payment into court by the defendant be borne by the plaintiff," subject to appeal to a Divisional Court of the Queen's Bench Division, as to the question of jurisdiction.

Nov. 29. KELLY, C.B., and CLEASBY, B., sitting as the Queen's Bench Division, rescinded the order, on the ground that Huddleston, B., had no jurisdiction either as the judge who tried the action or as a judge at chambers.

The defendant appealed.

Fullarton, for the defendant. Costs in all cases are now regulated by Order LV. "Subject to the provisions of the Act, the costs of, and incident to, all proceedings in the High Court shall be in the discretion of the Court. . . . Provided that when any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried or the Court shall otherwise order." First, Huddleston, B., had jurisdiction to make the order as the judge who tried the action; no application was made at the trial, and no application could have been made, for the materials for the application were not then in the possession of the defendant: but Order LVII., Rule 6, enables the Court or a judge to enlarge the time appointed by the rules for doing an act or taking any proceeding, and here it must be taken that by making the order the judge at the same time enlarged the time.

[COCKBURN, C.J. "To enlarge the time." No time is fixed by Order LV., within which the application as to costs is to be made; it is to be made "at the trial." Order LVII., Rule 6, does not apply to such a case.]

Secondly, Huddleston, B., had jurisdiction as a judge at chambers; "or the Court," in Order LV., includes a judge at chambers.

[BRETT, J.A. On the contrary, the omission of "or a judge" was designedly intended to confine the jurisdiction to the Court, who alone should have power, if the judge at the trial made no order, to deprive a successful party of what was otherwise his absolute right to costs.]

Sect. 39 of the Judicature Act, 1873, at all events, gives the power to a judge at chambers, as by that section a judge of the High Court is to exercise all the powers hitherto exercised by a judge at chambers. Lastly, if the Court should be of opinion that the judge had no jurisdiction, they will themselves make the order which the justice of the case requires. Or they can give him relief under Order XLII., Rule 22.

Geary, for the plaintiff, was not called upon.

COCKBURN, C.J. I am of opinion that this appeal must be dismissed. The Judicature Acts, and the orders made under them, deal, amongst other things, with the subject of costs incidental to proceedings in an action up to the trial and the returning of a verdict by the jury. By Order LV., provision is made that, as a general rule, on a trial by jury, costs shall follow the event, but it is to be in the power of the judge, on application made at the trial, to make any order as to costs which he may think proper, where, in his opinion, the circumstances justify a departure from the general rule. There is also power given to the Court to make an order to deprive a successful party of his costs, to which he would otherwise be entitled by the event of the trial. The question is, whether either of these two courses has been pursued by the defendant, the party who was unsuccessful and did not get the verdict to which he may possibly have been entitled. Unfortunately a witness, by mistake, made a statement as to one item (of 2*l.* 7*s.*), which, being uncontradicted, justified the jury in finding that sum to be still due from the defendant to the plaintiff. The witness has since discovered his mistake, and informed the defendant of it, and the result is that, as to this item, the verdict clearly ought to have been for the defendant. There is also another item (of 1*l.* 19*s.*), as to which the defendant was misled by the particulars. There were, therefore, good grounds for a new trial, had these items been of sufficient amount; but the Court of

1877

BAKER v. OAKES.

Queen's Bench, acting on the usual rule, refused the application on the ground that the amount involved was too small. What, under these circumstances, should the defendant have done? He had omitted to make any application as to costs to the judge at the trial, but it was still open to him to have applied to the Court. Unfortunately that course was not pursued, but a summons was taken out before a judge at chambers, and the judge referred the matter to Baron Huddleston, who had been the presiding judge at the trial. No application, however, had been made to him at the trial, and consequently I am clearly of opinion that Baron Huddleston, as the judge at nisi prius, had no jurisdiction, but was functus officio at the time he made this order.

Secondly, had the learned Baron jurisdiction as a judge representing the Court? It may be taken that he was acting as a judge at chambers, but I am clearly of opinion that, as such, he had no such power; for Order LV. only gives the power to the judge at the trial or to the Court. The application to the Queen's Bench Division was not made under Order LV., but was only by way of appeal from the order of Baron Huddleston, and the judges acting for the Queen's Bench Division were right in saying that the order was ultra vires. If the application had been to the Court itself, I think there can be no doubt it would have had power to deal with the costs. But the question we have now to decide is, whether that order of the Court, rescinding the original order as made without jurisdiction, was right, and we have no power to deal with this case as if we were a Court of first instance. All we can say is, that the order of the Queen's Bench Division was right, but without prejudice to any original application to the Queen's Bench Division under Order LV.

Sect. 39 of the Act of 1873 was relied on for the defendant, but it cannot apply to the present case, for Order LV., which it is admitted is the Order which governs the case, gives jurisdiction only to the judge at the trial, or to "the Court," without the alternative "or a judge." It is clearly, therefore, not a case in which it was intended to give jurisdiction to a judge at chambers. In all the other sections or Orders in which the intention is to give jurisdiction to a judge at chambers, the power is given to the Court or a judge; but Order LV. is express that the power shall be exercised

only by the judge at nisi prius or by the Court. The Divisional Court, therefore, may have jurisdiction to make an order; but the order of Baron Huddleston was clearly without jurisdiction, and the appeal fails, and must be dismissed with costs.

BRETT, J.A. In this case there had been a trial before a jury, and a verdict was returned for the plaintiff for a small amount; the motion for a new trial was refused, and as to that there was no appeal. We must, therefore, deal with the case as though the verdict was rightly entered for the plaintiff, though for a small amount. Some time after the trial, application was made to Baron Huddleston, at chambers, on an affidavit of circumstances which had come to the knowledge of the plaintiff since the trial; and Baron Huddleston made an order depriving the plaintiff of costs from the time of the payment into court. It is suggested that the judge had jurisdiction in one of two ways: either as the judge who tried the action, or as a judge at chambers representing the Court. I think he had not jurisdiction in either capacity. First, it is said he had jurisdiction because he was the judge who tried the action; but the right to costs depends entirely on Order LV., which, under ordinary circumstances on a trial by a jury, gives costs affirmatively and generally to the successful party, "the costs shall follow the event." But then the Order goes on, "unless, upon application made at the trial, for good cause shewn the judge before whom such action is tried or the Court otherwise order." I am clearly of opinion that the case is not brought within that proviso; no application was made at the trial, and therefore the judge could not make the order, a condition precedent to giving him jurisdiction not having been fulfilled. But it was said he could make the order by virtue of Rule 6 of Order LVII., which gives power to a Court or a judge to enlarge the time appointed by the rules for doing any act; so that by means of the two Orders Baron Huddleston could act, notwithstanding no application was made at the trial. But "a Court or a judge" means the Court sitting in banc or a judge at chambers representing the Court in banc. It has never been held that such a phrase comprised a judge, who was neither the Court nor acting at chambers, merely because he was the judge at the trial.

4 C.P.D. 433.

1877

BAKER v. OAKES.

But then it was urged that Order LVII., Rule 6, gave him power as a judge at chambers to enlarge the time for the application to him as judge who tried the cause. I cannot think that this rule can have any such operation so as to enable a judge to act notwithstanding no application was made at the trial. Therefore I am clearly of opinion that the case is not brought within the terms of Order LV., and that the judge had no power to make the order as the judge who tried the action.

Secondly, it was argued that the judge had jurisdiction as a judge at chambers. If the terms of Order LV. were, "or the Court *or a judge* shall otherwise order," that would be so. But I must say that, notwithstanding what has often been said about these rules, they were drawn with the greatest care, and I have no doubt that the alternative "or a judge" was advisedly omitted in Order LV. It was intended that the general rule as to costs should not be varied except by the judge on the instant when the facts were all before him and fresh in his memory, and that so important a matter as the right to the costs of a trial should not be varied after the trial except by an application to a Divisional Court; and the jurisdiction of a judge was advisedly excluded. I am, therefore, of opinion that "Court" does not include a judge at chambers.

It was further argued that s. 39 of the Judicature Act of 1873 applied; but that section does not enable a judge of the High Court to do anything that a judge could not have done before the passing of the Act; and before the passing of the Act a judge at chambers could not have made this order as to costs.

As to Rule 22 of Order XLII., no new fact has arisen; there has been a miscarriage, no doubt, owing to a mistake, but that rule only applies to facts which have arisen too late to be pleaded.

On the whole, therefore, I am clearly of opinion that the order of Baron Huddleston was without jurisdiction, and that the order of the Queen's Bench Division was right. This is all we can decide, as we have no original jurisdiction to make an order as to costs.

AMPHLETT, J.A. I am of the same opinion, on the same grounds. I will only add a few words. It was suggested that

injustice might happen, supposing the judge had left the court, or perhaps the circuit town, before a verdict was returned, so that no application could be made as to costs; but I should think that the application might be formally made to the officer who is delegated by the judge to take the verdict; there was, however, no application made in the present case.

Appeal dismissed. (1)

Solicitors for plaintiff: *Abbott, Jenkins, & Abbott.*
Solicitors for defendant: *Hewitt & Alexander.*

SCUTT *v.* FREEMAN. *Jan.* 15.

Practice—Action ordered to be tried in County Court—Certificate of Result of hearing Cause—Motion for Judgment—Order XXXVI., Rule 22; *Order XL., Rule* 1—*County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 26.

Orders XXXVI. and XL. do not repeal the enactment in 19 & 20 Vict. c. 108, s. 26, by which, where a cause is ordered to be tried in a county court, the registrar is to certify the result of the trial to the superior court, and judgment is to be signed according to such certificate; and no motion for judgment is necessary.

AN order having been made for the trial of this action in a county court, under the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26 (2), there was a verdict for the plaintiff, who signed judgment on the certificate of the county court registrar. A

(1) See *Parsons* v. *Tinling* (2 C. P. D. 119).

(2) By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26, "Where in any action of contract brought in any superior court the claim endorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a judge of a superior court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name, and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue, and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

1877

SCUTT v. FREEMAN.

summons was taken out at chambers calling on him to shew cause why the judgment should not be set aside, on the ground that there ought to have been a motion in the superior court for judgment under the Judicature Act, 1875, Order XL., Rule 1. This summons having been dismissed,

Gye, for the defendant, moved, by way of appeal, to set aside the judgment. Under Order XXXVI., Rule 22, "no judgment shall be entered after a trial without the order of a court or judge." By Order XL., Rule 1, "Except where by the Act or by these Rules it is provided the judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment." These regulations supersede the provision in 19 & 20 Vict. c. 108, s. 26, by which judgment may be signed on the certificate of the county court registrar.

Horne Payne, for the plaintiff. There is nothing in the Orders referred to which can be taken to repeal the enactment as to signing judgment on the certificate. In *Lloyd* v. *Lewis* (1), where it was held that a motion for judgment was unnecessary upon an award where the reference was before the Judicature Act, 1875, came into operation, Brett, J.A., expressed his opinion that Order XL. must not be construed so as to interfere with the ordinary practice of the law and to cause useless expense. It may be mentioned that Lindley, J., at chambers, has already decided that in cases like the present judgment may be signed without application to a judge.

PER CURIAM (Mellor and Lush, JJ.). There is nothing in the Orders XXXVI. and XL., by implication or otherwise, to repeal the enactment as to signing judgment upon the certificate of the county court registrar.

Motion refused.

Solicitors for plaintiff: *Williamson, Hill, & Co.*
Solicitors for defendant: *Le Riche & Son.*

(1) 2 Ex. D. 7.

THE DISS URBAN SANITARY AUTHORITY, APPELLANTS; ALDRICH, RESPONDENT. 1877 *Feb.* 16.

Justices, Power of, to state Case—20 & 21 *Vict.* c. 43—*Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), s. 305—*Authority to enter Premises.* 2 QBD 285

Justices have no power to state a case on refusing to make an order authorizing the local authority to enter premises under the Public Health Act, 1875, s. 305, inasmuch as this is not the determination of a complaint within 20 & 21 Vict. c. 43, s. 2.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts, so far as material, were as follows. The appellants being about to construct a new sewer under the powers given by the Public Health Act, 1875 (38 & 39 Vict. c. 55), gave notice to the respondent, under s. 16 of that Act, that they intended to carry the sewer under the land of the respondent, their surveyor having reported that it was necessary to do so. The respondent refused to allow them to enter his land for the purpose of making the sewer, and the appellants thereupon applied to the justices under section 305 of the Act, for an order authorizing them to enter.

On the evidence laid before the magistrates at the hearing, it was contended on behalf of the respondent that the sewer intended to be made would be in contravention of the 17th section of the Act, because the effluent water would deteriorate the purity of the river into which the outfall was to be.

It was contended for the appellants, that this was not a matter which the magistrates had any power to take into their consideration in deciding whether to grant or refuse an application under the 305th section. The magistrates refused the application on the ground suggested by the respondent, and stated the case to obtain the opinion of the Court whether they were right in point of law in so doing.

Wills, Q.C. (*Hannen* with him), for the respondent, took the preliminary objection that the case was not one within 20 & 21 Vict. c. 43, s. 2. By the 2nd section the power is given to state a case where, "after the hearing and determination by a

1877

DISS URBAN SANITARY AUTHORITY v. ALDRICH.

justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made," either party is dissatisfied with the determination as being erroneous in point of law. Here, there is nothing in the nature of a complaint. There is power to apply to the justices, in certain cases, for a licence which may authorize the doing of acts which would otherwise be trespasses, and the justices have an absolute discretion to give or refuse such a licence, according as under the circumstances they may think it should be granted or not. The 305th section says, that "if no sufficient cause is shewn against the application, the Court may make an order accordingly." It is clear that the word "may" here imports a purely discretionary power, because in the next section it is provided that in another case the justice "shall" by order require the occupier to permit the execution of works. There is no ground of complaint against the party before the order is obtained. He only acts in his own right to refuse the local board admission.

Lumley, for the appellants. It is contended that the justices' functions under the 305th section are not purely discretionary; the justices exercise a judicial function under the section, though the matter on which they here exercised it was beyond the limits of their jurisdiction. They are the judges to determine whether the entry is really necessary for the purposes of the works intended to be carried out, and it may be that the words "if no sufficient cause is shewn" give them judicial powers with regard to various considerations, though not with regard to the general advisability of the proposed works; for that is matter for the discretion of the local board, against whom there is a remedy if a nuisance is subsequently created. It is further contended, that when the magistrates exercise a judicial function in making an order, the provisions of 20 & 21 Vict. c. 43, apply. The respondent's construction of the word "complaint" is unnecessarily narrow. The matter of complaint is the refusal to admit for the purpose of doing the works which, by the general scope of the Act, the local authority is empowered to carry out.

[LUSH, J. The respondent has done no wrong. He simply says that his house is his castle.]

By the 16th section of the Act the urban sanitary authority has a right to enter to make sewers, and this right the respondent refuses to allow them to exercise.

[LUSH, J. If they have a right to enter, why is an application under the 305th section necessary? The 305th section would seem only to apply when there is no power given to enter without an order.]

It is contended that there is nothing unreasonable in its applying even when the Act gives the power of entry without an order. It is very desirable that when the landowner refuses admission the local authority should be able to get judicial authority to enter.

[MELLOR, J. There does not seem to be any complaint here upon which there can be a determination "erroneous in point of law." The justices are given, in certain cases, a discretionary power to grant a licence to enter.]

The Act gives a right to enter under s. 16, and the party refuses to allow it to be exercised. The application to the justices is to make an order that it shall be exercised. This may fairly be termed an order made upon a complaint.

[LUSH, J. The suggested definition, of what constitutes a determination on a complaint under 20 & 21 Vict. c. 43, s. 2, seems far too wide.

MELLOR, J. It would seem that such a mode of construction would include almost every matter on which magistrates exercise jurisdiction.]

The reasonable limitation is to cases where they exercise a judicial function. The cases in which it has been held that there is no power to state a special case are cases where their functions are ministerial, as where there is an application for a distress warrant to enforce a poor-rate.

THE COURT (Mellor, J., and Lush, J.), declined to hear the case on the ground that they had no jurisdiction.

Appeal dismissed.

Solicitors for appellants: *Sole, Turners, & Knight.*
Solicitor for respondent: *Oldman.*

1877
Jan. 22

[IN THE COURT OF APPEAL.]

TULLY *v.* HOWLING.

Charterparty—Rejection—Time—Detention.

2 Ex D 340

The plaintiff agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when the plaintiff was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:—

Held, affirming the decision of the Queen's Bench Division, that the plaintiff was entitled to throw up the charterparty.

A CHARTERPARTY or agreement was, on the 4th of March, 1875, made between C. Tully, the plaintiff, and L. W. Howling, the defendant, the material part of which was as follows:—

It is this day mutually agreed between L. W. Howling, Esq., owner of the ship or vessel called the *Conquest*, of London, of the burthen of 187 tons register admeasurement, or thereabouts, whereof William Sanson is master, now in Sunderland, bound to London, and Messrs. Chas. Tully & Co., merchants and freighters of the said ship, for twelve months, for as many consecutive voyages as the said ship can enter upon after completion of the present voyage at and from Sunderland to London; that the said ship being tight, staunch, and strong, and every way fitted for the voyage, the said master, with the said ship, shall, with the first opportunity, load a full and complete cargo of coals in river or dock, at an approved berth, drops, or staiths, and being so laden shall therewith proceed to London, or so near thereto as she can safely get, and deliver the same to the order of the said freighters or their assigns, he or they paying freight for the same at the rate of 7*s.* per ton.

After the voyage was completed, and when the plaintiff was ready to load the ship she was, by order of the Board of Trade, detained as unseaworthy. The plaintiff refused to take the ship. The necessary repairs were not finished until more than two months after the voyage was completed. The plaintiff had brought an action against the defendant for a debt of 30*l.* The defendant, admitting the debt of 30*l.* set up a counter-claim for damages for not taking the ship, freights having in the meantime fallen.

The facts and dates are stated in detail in the judgment in the Court of Appeal.

At the trial a verdict was given for the defendant, damages 122*l.*,

from which the 30*l.* was to be deducted, leave being reserved to the plaintiff to move for judgment for 30*l.*

The plaintiff moved accordingly in the Queen's Bench Division.

June 2, 1875. *Waddy, Q.C.*, and *Crompton*, for the plaintiff.

R. E. Webster, for the defendant.

The arguments were the same as on the appeal, and, in addition, the following cases were cited: *McAndrew* v. *Chapple* (1); *Tarrabochia* v. *Hickie* (2); *Simpson* v. *Crippin.* (3)

COCKBURN, C.J. This case seems to my mind perfectly clear. The cases cited by Mr. Webster have no application; they were not cases in which the contract was one that had reference to a given time or to the use of the ship for a given time, and that is the essence of the present contract. The plaintiff says: "I want a vessel for twelve months from a given date," or, if you please, "from the termination of a given voyage." I think it is a matter of doubt which of those two is the right construction of the contract; but taking it either way, what it comes to is this. The bargain is that the plaintiff is to have the use of the ship for twelve months, but the defendant is not in a position to give him the ship for twelve months from the date from which it was agreed the term should begin, whether it was a given date or the termination of a given voyage. He is not in a position to give him the use of the vessel, because she is in such a state that neither the owner nor the charterer would be justified in sending her to sea, and the defendant admits that to be the case, for he takes upon himself to repair the vessel. By the fact of his taking the vessel back on his own hands to repair, he makes it impossible for him to perform his part of the contract, which is, that the charterer shall have the use of the vessel for twelve months from a given period. Therefore, the result is, that if the charterer is to take the vessel at all he must take her not for twelve months, but for twelve months less two months. Therefore, it cannot be said that there was not a substantial deviation from the contract. I am of opinion that, under the circumstances,

(1) Law Rep. 1 C. P. 643. (2) 1 H. & N. 183; 26 L. J. (Ex.) 26.
(3) Law Rep. 8 Q. B. 14.

1877

TULLY v. HOWLING.

the plaintiff was perfectly justified in saying, "What I bargained for was the use of the ship for a consecutive series of voyages; you cannot give me that, and I am not bound to go into the market to get some other ship and make some other bargain which may be advantageous or disadvantageous to me." I think these facts distinguish the case from those cited by Mr. Webster, in none of which was time of the essence of the contract.

MELLOR, J. I am of the same opinion. I think there is nothing in the contract to shew that the time might be divided into months. The contract which was contemplated was a contract for twelve months. During a substantial part of the twelve months, quite sufficient to frustrate the object of the contract, there was an inability to comply with the bargain which had been come to between the plaintiff and the defendant. Under these circumstances I cannot entertain any doubt that it was such a failure as entitled the plaintiff to say "I will end the contract and find some other means of carrying out my object."

LUSH, J. I am of the same opinion. The bargain was a bargain for the use of a ship for twelve months, and the owner was not, at the time when the contract began to run, enabled to give the charterer that use, and was unable to give it for two months afterwards. In my opinion, under those circumstances, the charterer may, if he pleases, repudiate the contract, because he contracts for twelve months' service, and he is not bound to take ten months' service. The cases cited by Mr. Webster stand on an entirely different footing. All those were cases of voyage charters. Where a ship is chartered for a voyage without any definite period for the commencement of the voyage, and a delay takes place, the question is, whether that delay is so great as to frustrate the object for which the charterer entered into the charterparty. Here it is not so. The plaintiff cannot have the services of the ship he contracted for during twelve months, and the question is to be determined upon the construction of the contract itself. Here he bargained to have the services of the ship for twelve months from the time when she should return from the voyage from Sunderland to London, which she was about to commence, and she

had returned from the voyage on the 23rd of March. Then the time began to run for which he stipulated to have the services of the ship. It is then discovered that the ship is in such a state that the owner is not able to take her to sea. Then the order came from the Board of Trade, and it takes two months to repair her. After that time the shipowner says, "You are bound to take her for the rest of the time." But I apprehend that on no principle could he say that. This is entirely different from a case of a voyage-charter, where the only question is, whether the delay is so great as to make it useless to prosecute the voyage to its intended end. I cannot say that I have the slightest doubt upon the point, therefore the judgment for the defendant must be set aside, and the judgment entered for the plaintiff.

Judgment for the plaintiff.

The defendant appealed.

Nov. 15 & 16, 1876. *Philbrick, Q.C.*, and *R. E. Webster*, for the defendant. No doubt if there had been nothing to prevent it the year would have begun on the 9th of April, but there is no condition precedent that the ship shall be ready at the appointed time, and the only question is, whether the objects of the charterer were frustrated by the delay; if not, he cannot throw up the charter, and can only recover damages. Here he was not able to get a cargo for the ship at the time, and was obliged after some delay to procure a cargo of his own. He might have taken up another ship if he had really wanted one. It is not suggested that the ship would not be ready in a short time. The charter was not to begin to run until she came back from London. Suppose that she had been detained there. Or, suppose she had, after the first voyage, been detained. There is in a time-charter no warranty: *Havelock* v. *Geddes*. (1) The truth is, no doubt, that the market fell, and the plaintiff was glad to throw up the charter. The rule is laid down in *Dimech* v. *Corlett* (2) and *Behn* v. *Burness*. (3) If they had agreed that she was to be ready on a given day it might make a difference, as then time might be of the essence of the contract. *Jackson* v. *Union Marine Insurance Co.* (4) shews

(1) 10 East, 555.
(2) 12 Moo. P. C. 199.
(3) 3 B. & S. 751; 32 L. J. (Q.B.) 204.
(4) Law Rep. 8 C. P. 572.

Ydc 9 Jur NS. 621.

1877

TULLY v. HOWLING.

the rule, and though it relates to a voyage-charter, that makes no difference. The plaintiff might have had a full year from the time when the ship was ready. He was to have the ship for a year, and that was the meaning of the contract.

Crompton (*Waddy, Q.C.*, with him), for the plaintiff. The defendant was bound within a reasonable time after the arrival of the vessel to tender her fit for the cargo. A few days' delay might not have signified, but this was indefinite. How long was the plaintiff to wait? Six months or nine months, and then have her for the rest of the year only? This is not a question of seaworthiness, for the vessel could not start at all. Was the plaintiff to look for another ship, and then at the expiration of the first voyage, if she was not ready, look for another, and so on? If once the charter had been acted on, the case would be different, and it would be a question of damages, but here the contract has altogether failed: *Bradford* v. *Williams*. (1)

Webster, in reply, cited *Rankin* v. *Potter*. (2)

Cur. adv. vult.

Jan. 22. The judgment of Kelly, C.B., Mellish, L.J., and Amphlett, J.A., was delivered by

MELLISH, L.J. This was an appeal from a judgment of the Queen's Bench Division ordering a verdict, which at the trial had been entered for the defendant on a counter-claim, for 92*l.*, to be entered for the plaintiff for 30*l.*, pursuant to leave reserved. The defendant admitted that he owed the plaintiff the 30*l.*, and the only question in the cause was, whether the defendant, under the circumstances proved at the trial, was entitled to succeed on a counter-claim by which he sought to recover damages from the plaintiff on account of the plaintiff having refused to perform a charterparty he had entered into with the defendant. By this charterparty it was agreed that the defendant's vessel, the *Conquest*, then in the port of Sunderland, and bound for London, should be chartered to the plaintiff for twelve months for as many consecutive voyages between Sunderland and London as the said ship could enter upon after the com-

(1) Law Rep. 7 Ex. 259. (2) Law Rep. 6 H. L. 83.

pletion of the then present voyage. The *Conquest* duly completed her then present voyage, and in March, 1875, returned to Sunderland. On the 8th of April the defendant gave notice to the plaintiff that on the 9th of April the *Conquest* would be ready to receive her cargo, and it was admitted in the argument before us that the year for which the *Conquest* was chartered began to run on the 9th of April. The plaintiff endeavoured to procure a cargo for the *Conquest*, but for some time he was unable to procure one. He then determined to load the *Conquest* on his own account, and on the 20th of April gave notice to the master that he was ready to load. Before, however, any cargo was actually loaded, the officer of the Board of Trade objected to the vessel taking any cargo on board on account of her being unseaworthy, and on the 7th of May, a formal order was issued detaining the *Conquest* until she was repaired. Thereupon, the plaintiff, on the 9th of May, not being able to get the vessel, gave notice to the defendant that he rescinded the charter. The defendant proceeded without delay to repair the *Conquest*, and by the 17th of June she was repaired and ready to receive cargo, but the plaintiff refused to load her.

Under these circumstances it has been held by the Queen's Bench Division that the plaintiff was justified in rescinding the charter, and in refusing to load the *Conquest*, and we are of opinion that their judgment ought to be affirmed. It was admitted on the argument before us that the year for which the *Conquest* was chartered commenced on the 9th of April, and that the *Conquest* was not really ready to receive cargo, so that the plaintiff could have had the use of her, until the 17th of June; and therefore the questions simply are, whether a person who has agreed to charter a vessel for twelve months, commencing from the 9th of April, is bound to wait until the 17th of June before he obtains possession of the vessel, and whether he is then bound to take her for a period of less than ten months? In other words, in a charter for a stipulated time, is the time of the essence of the contract, or is the charterer bound to take the vessel for a time substantially different from the time specified in the charter? We are of opinion that as in a charter for a voyage the specified voyage would be of the essence of the contract, and the charterer, if he could

1877

TULLY v. HOWLING.

not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, so in a charter for time, if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time or a substantially different time, and if he cannot get the vessel for the specified time he may throw up the charter. In all contracts which are to be mutually performed the party who claims performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which was contracted to be given. If there is an agreement to sell 100 quarters of wheat, the purchaser is not bound to accept 90 quarters, though the price of wheat has fallen, and it is for his advantage to have the smaller quantity. He can say, "I never agreed to buy a quantity of 90 quarters, and therefore I will not take them." So in the present case the plaintiff can say, "I never agreed to charter the *Conquest* from the 17th of June, 1875, to the 9th of April, 1876, and therefore I will not take her for that period." Several cases were referred to, but the only case which related to time charters was *Havelock* v. *Geddes*. (1) In that case, however, it was admitted on the pleadings, as is repeatedly pointed out by Lord Ellenborough in his judgment, that the charterer had had the use of the ship, and that the action was brought to recover freight actually earned, and under those circumstances the Court no doubt held that it was no defence that the ship had not been repaired in due time before the commencement of the charter; but it was not held that a charterer who has chartered a vessel for twelve months is bound to accept the use of the vessel for a substantially different period, nor is any opinion expressed to that effect. The other cases which were cited seem to us to have no bearing on the subject.

BRETT, J. I agree; not on the ground that there is in such a charter a warranty that the ship should be seaworthy on the day when the charter is to commence, with a right to reject the ship if the warranty is not complied with, nor on the principle that time was of the essence of the contract, but on the ground that, under the circumstances proved at the trial, the jury might, and indeed

(1) 10 East, 555.

should, in reason, have found that the ship was not fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure.

1877

TULLY v. HOWLING.

Judgment affirmed.

Solicitors for plaintiff: *J. W. Hickin, for R. Brown & Son, Sunderland.*

Solicitors for defendant: *Lowless & Co.*

THE METROPOLITAN RAILWAY COMPANY *v.* DEFRIES AND OTHERS.

Jan. 30.

Use and Occupation—Vendor and Vendee—Vendor remaining in Possession after Time fixed for Completion—Vendee entitled to "all Rents and Profits."

Claim for use and occupation, stating that the plaintiffs and defendants entered into an agreement for the purchase by the plaintiffs of warehouses and premises belonging to the defendants. That by the agreement the purchase was to be completed and possession given to the plaintiffs on the 29th of September, 1869, up to which time all outgoings were to be paid by the defendants, and from which time the plaintiffs were to receive all rents and profits, the plaintiffs to pay interest on the purchase-money from the 29th of September until the completion of the purchase. That in fact the purchase was not completed till the 13th of March, 1876, though the plaintiffs were ready and anxious to have completed it at an earlier date. That the plaintiffs paid the purchase-money by instalments on various dates prior to the 13th of March, 1876, and interest on the same according to the agreement. That the defendants refused to give up possession on the completion of the purchase, &c., but the plaintiffs obtained possession by warrant from the sheriff on the 3rd of April, 1876:—

Held, that under the words "all rents and profits" in the agreement, the plaintiffs were entitled to a fair occupation rent, and that it was immaterial whether or not the occupation would by itself have been sufficient to support the action.

affirmed on appl 24 Ch D. 387 C.A.

STATEMENT OF CLAIM.

1. The plaintiffs are a railway company who were authorized by the Metropolitan Railway (Tower Hill Extension) Act, 1864, to take for the purposes of their Act certain warehouses and premises in Gravel Lane, Aldgate, City, which belonged to the defendants.

1877

METROPOLITAN RAILWAY CO. v. DEFRIES.

2. On the 5th of March, 1868, the plaintiffs and the defendants entered into an agreement for the purchase by the plaintiffs from the defendants of the warehouses and premises in Gravel Lane for the sum of 8800*l.*

3. By the agreement it was (inter alia) agreed that the purchase should be completed and possession given to the plaintiffs' company on the 29th of September, 1869, up to which time all outgoings were to be paid by the vendors, and from which time the company were to receive all rents and profits, and that the company should pay interest on the sum of 8800*l.* at certain rates therein agreed upon from the 29th of September, 1867, until the completion of the purchase.

4. The purchase of the premises was not completed till the 13th of March, 1876, although the plaintiffs were ready and anxious to have completed the purchase at an earlier date.

5. The plaintiffs paid the purchase-money by instalments on various dates prior to the 13th of March, 1876, and interest also on the same according to the agreement of the 5th of March, 1868.

6. The defendants refused to give up possession of the premises on the completion of the purchase, and alleged that they were entitled to six months' notice from the plaintiffs prior to their being obliged to give up possession of the warehouse and premises.

7. The plaintiffs contended that no such notice was requisite to entitle them to the possession of the warehouse and premises, and therefore issued their warrant to the sheriff of Middlesex to put them into possession of the same.

8. Possession was accordingly given to the plaintiffs on the 3rd of April, 1876.

9. The defendants have continued in the use and occupation of the warehouse and premises from the 5th of March, 1868, until the 3rd of April, 1876, but have paid no rent for the same.

10. The plaintiffs claim rent of the defendants for their use and occupation of the premises at the rate of 150*l.* per annum as the fair value of the same from the 29th of September, 1869, until the 3rd of April, 1876.

Demurrer and joinder in demurrer.

1877

METROPOLITAN RAILWAY CO. v. DEFRIES.

Edward Pollock (*Gates, Q.C.*, with him), in support of the demurrer. The statement of claim does not shew any occupation of the premises by the defendants as tenants to the plaintiffs. The occupation by the defendants between the 13th of March and the 3rd of April, 1876, may possibly have been wrongful, but it must be taken that, up to the 13th of March, the delay was not their fault, and they did not occupy as tenants. The mere fact that the vendor remains in possession after the time for completion is not enough to make him liable in an action for use and occupation: *Tew* v. *Jones*. (1) The Courts of Equity have held that, where a delay in taking possession is the fault of the purchaser, he is not entitled to any occupation-rent in respect of the premises: *Dakin* v. *Cope*. (2) Lastly, the plaintiffs waived their right (if any) by paying the full amount of the purchase-money without seeking any deduction in respect of rent.

Grantham, for the plaintiffs. The plaintiffs seek to recover under the express terms of the agreement, by which they are entitled to "all rents and profits" from the day fixed for the completion of the purchase. In *Sherwin* v. *Shakespeare* (3), where conditions of sale provided that the balance of the purchase-money should be paid on the 25th of April, "when the purchase shall be completed and the purchaser shall have the rents, profits, &c.;" a decree for specific performance was granted at the suit of the vendors, but an account was ordered as against them of rents and profits. It does not appear that the plaintiffs were in default. The defendants seem to have insisted that they were tenants of the premises and entitled to six months' notice.

Edward Pollock, in reply. The defendants were never in possession except as unpaid vendors.

MELLOR, J. I am of opinion that this demurrer must be overruled, on the ground that the statement of claim shews that the plaintiffs have a cause of action, for the amount of the rents and profits of the premises during the interval which elapsed before the purchase was completed. I think that the words of the agreement of purchase are consistent with that view and with no other. It appears that the

(1) 13 M. & W. 12. (2) 2 Russ. 170; on appeal, p. 181.
(3) 5 De G. M. & G. 517; 23 L. J. (Ch.) 177.

1877

METRO-POLITAN RAILWAY CO. v. DEFRIES.

plaintiffs agreed to purchase these premises from the defendants, and the time at which the purchase was to be completed and possession given to them was fixed, namely, the 29th of September, 1869, up to which time all outgoings were to be paid by the vendors, and from which time the plaintiffs were to receive "all rents and profits," and it was agreed that the plaintiffs should pay interest on the purchase-money from the 29th of September until the completion of the purchase. The agreement, therefore, on the one hand, secured to the vendors interest on any part of the purchase-money that remained unpaid, and on the other hand secured to the vendees that they, paying this interest, should be entitled to the rents and profits of the premises. Now, at the date of this agreement, it was known to both parties that the defendants were in possession of the premises, so that there were no profits from the premises except those enjoyed by the defendants. I agree that, in the absence of the words "rents and profits," it might have been open to the defendants to argue that there were no facts from which any liability to pay the amount claimed in this action could be inferred. But the case in the Court of Chancery to which we have been referred, *Sherwin* v. *Shakespeare* (1), is a strong authority in point. In that case a delay had taken place which does not appear to have been the fault of either party. The Court ordered that interest should be paid by the vendee in respect of his delay in paying the purchase-money, and that the vendor should pay an occupation-rent for the time during which he remained in possession of the premises. There was some discussion as to whether the vendor should be allowed income-tax, but the substantial value of the decision is that a Court of Equity decided that he must pay rent during the portion of time that he was in occupation. The case was very much the same as the present, and I am satisfied that judgment ought to be for the plaintiffs, and that the defendants are liable to pay an occupation-rent. It is true that the amount of such rent has never been fixed, but it may be fixed at the trial. It has been urged, that it cannot be said that the defendants were placed or allowed to remain in possession of the premises by the plaintiffs. But the express terms of the agreement get rid of any difficulty on this score. It seems just

(1) 5 De G. M. & G. 517; 23 L. J. (Ch.) 177.

1877

METRO-POLITAN RAILWAY CO. v. DEFRIES.

and fair that on the one side there should be the liability to pay interest, and on the other a liability for the rents and profits.

FIELD, J. I am of the same opinion. This action is brought to recover the value of premises during the time they were in the occupation of the vendors. The defendants, as matters stand, do not deny that they were in occupation of the premises after the time for giving up possession, and they do not deny that interest was paid on the purchase-money up to the time when possession was given, but they contend that the statement of claim does not shew any cause of action for use and occupation. Now, it is a great mistake to suppose that all the requirements of the old action for use and occupation must be put into the statement of claim. Under the old system this might have been the case, but under the present forms of pleading all we have to see is whether the statement shews facts upon which a Court of Equity would decree that money must be paid. Let us see what is stated as to the agreement. By the agreement it was agreed that the purchase should be completed and possession given to the plaintiffs on the 29th of September, 1869, up to which time all outgoings were to be paid by the vendors, and from which time the plaintiffs were to receive all rents and profits. Now what is the meaning of these words? They must mean that from that day the equitable ownership of the property is to vest in the plaintiffs, and that the defendants are to be considered as equitable owners of the purchase-money. The defendants, as equitable owners of the money, were to receive interest, and the plaintiffs were to have the rent. The parties to the agreement in effect say, "What we are agreeing upon may not happen, but it shall be as if it had happened." I think it clear that the words "all rents and profits" must mean that which is equivalent to them, an occupation rent. There might have been some difficulty if the plaintiffs had been obliged to shew that they were entitled to bring an action for rent according to the old forms of pleading, but this is not the case.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Burchells.*

Solicitors for defendants: *Scard & Son.*

1877
Feb. 15.

RUMBALL *v.* THE METROPOLITAN BANK.

Negotiable Instrument—Scrip—Shares in Banking Company—Estoppel.

Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery:—

Held, on the authority of *Goodwin* v. *Robarts* (1 App. Cas. 476; Law Rep. 10 Ex. 337), that the defendants were entitled to the scrip certificates as against the plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere delivery, and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a bonâ fide holder for value, was estopped from denying that they were so transferable.

SPECIAL CASE, the facts of which sufficiently appear from the judgment.

Feb. 6. *Anstie*, for the plaintiff. The present case is distinguishable from *Goodwin* v. *Robarts*. (1) There it was held that no distinction could be drawn between the scrip certificates and the bonds, the title to which they represented. The bonds being mere securities for money, and transferable by delivery, it was held that the scrip was so also. Scrip certificates representing the right to shares in the future stand on a wholly different footing. It is contended that a negotiable instrument must represent money, and that in none of the various cases decided with regard to the various classes of negotiable instruments has it been held that a negotiable character can be conferred on anything that is not a security for money. If a document contained an agreement to convey a piece of land to bearer, no usage could make this negotiable. All that the scrip represents is a right to become in future a partner in a joint-stock company. The effect of a decision

(1) Law Rep. 10 Ex. 337; 1 App. Cas. 476.

in the defendant's favour would be to repeal by implication the provisions of 30 & 31 Vict. c. 29. [He also cited 30 & 31 Vict. c. 131, s. 27–36; *Gurney* v. *Behrend* (1); *Barber* v. *Meyerstein* (2); *Daly* v. *Thompson* (3); *Beckitt* v. *Bilbrough* (4); *Midland Great Western Ry. Co.* v. *Gordon* (5); *Eustace* v. *Dublin Trunk Connecting Ry. Co.* (6); *Crouch* v. *Credit Foncier.* (7)]

Ridley, for the defendants. First, this scrip was, by virtue of the usage, negotiable by delivery; secondly, the defendants are entitled to retain the scrip on the principle of *Pickard* v. *Sears* (8), viz. that where of two innocent persons one must suffer, he must suffer who enabled the fraud to be committed. The case is undistinguishable on both these grounds from *Goodwin* v. *Robarts.* (9) The scrip and the shares are quite distinct. The scrip does not represent that which would not be itself negotiable, viz. the share, the share does not exist while the scrip is in being. It is the inchoate form of the share, and if by established mercantile usage it is treated as negotiable by delivery, the Court will give effect to such usage. There is no substantial reason why negotiability should be confined to securities for money in the sense contended for on behalf of the plaintiff. Mortgage bonds of an American railway may represent a right to land, plant, &c., and yet they might be transferable by delivery.

Anstie, in reply, cited *Arnold* v. *City Bank.* (10)

Cur. adv. vult.

Feb. 15. The judgment of the Court (Cockburn, C.J., and Mellor, J.) was delivered by

MELLOR, J. This was an action to recover four scrip certificates of the Anglo-Egyptian Banking Company, Limited, issued by that company to the plaintiff, and which had come into the hands of the defendants as holders for value, but through the fraud of the plaintiff's agent.

(1) 3 E. & B. 622; 23 L. J. (Q.B.) 265.
(2) Law Rep. 4 H. L. 317.
(3) 10 M. & W. 309.
(4) 8 Hare, 188; 19 L. J. (Ch.) 522.
(5) 16 M. & W. 804; 16 L. J. (Ex.) 166.
(6) Law Rep. 6 Eq. 182.
(7) Law Rep. 8 Q. B. 374.
(8) 6 A. & E. 469.
(9) 1 App. Cas. 476.
(10) 1 C. P. D. 578.

1877

RUMBALL v. METROPOLITAN BANK.

The certificates were in the following form: "This is to certify that the sum of 10*l.* per share has been paid in respect of the above shares (being 5*l.* per share on account of capital, and 5*l.* per share on account of premium), and that after the payment of the undermentioned further instalments to the London Joint Stock Bank, Princes Street, London, the bearer hereof will be entitled to be registered as the holder of ten shares of 20*l.* each in the Anglo-Egyptian Banking Company, Limited." Then followed the enumeration of the instalments, with the dates at which they were respectively to be paid, with the bankers' receipts in blank for the instalments as they should become due.

The first instalment on these certificates having been paid, they were left by the plaintiff in the hands of a Mr. Crossley, a stock-broker, for the purpose of his paying the remaining instalments as they became due, and dealing with the certificates as the plaintiff should direct. They were afterwards fraudulently deposited with the defendants by Crossley, without the knowledge or authority of the plaintiff, as security for an amount due from Crossley to the defendants on a loan account. The defendants, however, were not aware of the fraud or that there was anything wrong or irregular in the transaction. The question is, whether, under these circumstances, the plaintiff is entitled to recover these shares from the defendants or whether the defendants are entitled to retain them. This will depend on the following state of facts expressly set forth in the special case. It is there stated as follows: "Scrip certificates in a form similar to that of the said scrip certificates issued to the plaintiff have been issued by railway companies for thirty years past, by mining companies for twenty-five years past, and by banking, gas, water, and other companies for fifteen years past. Each of the above classes of scrip certificates during all the period since its respective issue has been well known to and largely dealt in by bankers, discounters, money dealers, and the members of the London Stock Exchange, and through them by the public. It is and has been the usage of such bankers, discounters, money dealers, and members of the said Exchange, during all the above periods, to buy and sell the said scrip certificates respectively, and to advance loans of money upon the security of them, and upon such dealings to pass the said scrip

certificates by mere delivery as a negotiable instrument transferable by delivery, and in fact the said respective scrip certificates have been supposed to be negotiable by mere delivery, and have been dealt with as such.

"As soon as a name has been inserted in the said scrip certificates, as that in which the shares for which the said scrip certificates can be exchanged are to be registered, the said scrip certificates, and others similar in form, cease to pass by mere delivery, and the usage above set out is no longer applicable to them."

The first question which presents itself is, whether the present case falls within the principle of the decision in *Goodwin* v. *Robarts*, as decided in the Court of Exchequer Chamber (1), and in the House of Lords on appeal (2); and we think it does, both with reference to the usage of the monetary world in respect of such certificates, which brings the case within the principle of the decision of the Court of Exchequer Chamber—which principle was affirmed by the Lord Chancellor in the House of Lords—and also on the other ground on which the decision of the House of Lords proceeded, namely, that if a party possessed of a security purporting on the face of it to be transferable by delivery chooses to leave such security in the hands of a third party, and the latter makes it over to a bonâ fide holder for value, the true owner must be taken to have brought about his own loss, and cannot recover it back. The Lord Chancellor there says: "The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker, or agent, and although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to any one taking it—a representation which the appellant must be taken to have made or to have been a party to—that if the scrip were taken in good faith

(1) Law Rep. 10 Ex. 337. (2) 1 App. Cas. 476.

1877

RUMBALL v. METROPOLITAN BANK.

and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign government; still the appellant is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. I am of opinion that, on doctrines well established, of which *Pickard* v. *Sears* (1) may be taken to be an example, the appellant could not be allowed to defeat the title which the respondents have thus acquired."

The present case appears to us to come within both these decisions: as regards the usage, within the principle of the decision of the Court of Exchequer Chamber; as regards the applicability of the doctrine of *Pickard* v. *Sears* (1) within the second ground of decision adopted by the House of Lords. The case being thus concluded by authority, it is unnecessary to deal with it on principle, and our judgment must be for the defendants.

Judgment for the defendants.

Solicitor for plaintiff: *Hodding.*

Solicitors for defendants: *Newman, Stretton, & Hilliard.*

(1) 6 A. & E. 469.

THE QUEEN, ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF POPLAR UNION, RESPONDENTS, *v.* INGALL AND ANOTHER, APPELLANTS.

1876
Nov. 15.

Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *ss.* 5, 6, 7, 14, 18, 23, 42 —*Preparation of Valuation List—Construction of Statute—Directory and not Imperative—Time fixed by Statute for doing Act.*

By the Valuation (Metropolis) Act, 1869, s. 5, provision is made for the appointment, within the metropolis, of assessment committees; by s. 6 a valuation list of rateable property is to be made by the overseers of every parish; by s. 7 (which incorporates certain sections of the Union Assessment Committee Act, 1862), the valuation list is to be deposited and afterwards transmitted to the assessment committee, who, after hearing objections and making such alterations as may seem sufficient, are, by s. 14, to approve the same; by s. 18 special sessions, and by s. 23 assessment sessions, are constituted for hearing appeals against valuation lists; by s. 42, "the overseers shall make and deposit the valuation list before the 1st of June," and "shall transmit the valuation list to the assessment committee not sooner than fourteen, and not later than seventeen, days after notice is given of the deposit of such list; the assessment committee shall finally approve . . . . the valuation list . . . . before the 1st of November;" and special sessions may be held at any time after the 30th of November and before the 1st of January.

The appellants were the occupiers of rateable property situate in a parish within the limits of the Valuation (Metropolis) Act, 1869. Upon the 27th of September, the overseers made and deposited a valuation list, in which the appellants' property was assessed at certain amounts. The list was transmitted to the assessment committee on the 18th of October. On the 7th of December the assessment committee met, when the appellants objected to the amounts at which their property was assessed, and these were reduced by the committee; after the meeting of the assessment committee no special sessions were held to which the appellants could have appealed, but they appealed to the assessment sessions, who confirmed the list:—

Held, that delay in making, depositing, transmitting, and approving the valuation list within the times prescribed by s. 42 of the Metropolis (Valuation) Act, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative.

CASE stated by the justices of the court of general assessment sessions holden under the Valuation (Metropolis) Act, 1869, in an appeal in which C. Ingall and E. Phillips were the appellants, and the assessment committee of the Poplar Union, the respondents.

1. The appellants were the owners of premises situate in the parish of All Saints, Poplar.

1876

THE QUEEN v. INGALL.

2. Previous to the valuation made as hereinafter stated the appellants were rated at 445*l.* gross, and 371*l.* rateable value.

3. Upon the 27th of September, 1875, the overseers of the parish of All Saints, Poplar, made and deposited a valuation list for that parish, in which the appellants' premises were assessed at 666*l.* gross, and 555*l.* rateable, value.

4. Upon the 18th of October, 1875, the list was transmitted to the assessment committee of the Poplar Union.

5. Upon the 7th of December, 1875, at a meeting of the assessment committee to hear objections to the list, the appellants, by counsel, reserved their right to dispute the validity of the list, and of the proceedings then being and about to be taken thereon, and objected to the valuation of their premises contained in such list, but notwithstanding such reservation urged objections and adduced evidence in support thereof; and after duly weighing and considering the same, the assessment committee altered the valuation of the said premises, and fixed 550*l.* gross, and 460*l.* rateable, as the value thereof.

6. The assessment committee approved the valuation list as altered by them upon the 4th of January, 1876, and sent the list to be re-deposited upon the 7th of January, 1876.

7. By the 3rd of the general orders made at the general assessment sessions on June 23rd, 1870, it is required that all appeals to the assessment sessions shall be entered by petition, to be lodged with the clerk to the assessment sessions on or before the 14th of January next following the final approval of the valuation list by the assessment committee.

8. The appellants duly gave notices of appeal to the assessment sessions before the 14th of January, 1876.

9. Upon the 21st of January, 1876, the assessment committee held a meeting to hear objections on behalf of persons or parties, other than the appellants, to the alterations made by the assessment committee in the valuation list, but no objections were made to the alteration of the valuation of the appellants' premises.

10. The valuation list was finally approved upon the 21st of January, 1876.

11. Between the hearing by the assessment committee of objections to the valuation list and the holding of the court of

general assessment sessions no special sessions had been held, to which the appellants could appeal against the decision of such assessment committee, in accordance with the directions and provisions of the Valuation (Metropolis) Act, 1869. Neither the appellants nor the respondents took any steps to obtain the holding of any special sessions for hearing an appeal.

Upon appeal to the general assessment sessions, holden on the 1st of March, 1876, against the decision of the assessment committee, it was ordered that the valuation list of the parish of All Saints, Poplar, should remain unaltered.

The question for the opinion of the Court was whether the valuation list was null, void, bad in law, and of no effect, by reason of such valuation list not having been made and deposited by the overseers of the parish of All Saints, Poplar, nor transmitted by them to the assessment committee, nor by the assessment committee finally approved and signed within the times limited by the Valuation (Metropolis) Act, 1869.

Nov. 8, 15. *Edward Clarke*, for the appellants. The valuation list is void; for the directions contained in the Valuation (Metropolis) Act, 1869, s. 42 (1), as to time have not been complied with; the list ought to have been made and deposited

(1) By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 17, "the valuation list for each parish, made and signed by the overseers . . . . shall be deposited by the overseers in the place in such parish in which rate-books are deposited or kept . . . . and the overseers shall give public notice of the deposit of such list on the Sunday next following the deposit of such list . . . . and the overseers shall, at the expiration of fourteen days from the time of the notice given of the deposit of such list, transmit the same to the committee."

Sect. 18 relates to giving notice of objection to valuation lists.

Sect. 19: "The committee shall hold such meetings as they may think necessary for hearing objections to the valuation lists, and shall, twenty-eight days at least before holding every meeting for hearing objections to valuation lists, other than meetings by adjournment, cause notice of such meeting to be given to the overseers of the several parishes to which such lists relate, and such overseers shall, on the Sunday next following the receipt of such notice, publish the same in the manner in which notice of a rate allowed by justices is by law required to be given, and the committee may at any such meeting hear and determine such objections, or may from time to time adjourn any such meeting, and adjourn or postpone the hearing or further hearing and determination of any such objections, and may, where

1876

THE QUEEN v. INGALL.

before the 1st of June, 1875; it was not made and deposited until the 27th of September: it ought to have been transmitted to the assessment committee not sooner than fourteen, and not

they think fit, direct notice of any such objections to be given by the overseers or by the persons objecting to third parties before the further hearing thereof."

Sect. 20: "The committee may, whether any objection be or be not made to any such valuation list, and either before or after any meeting for hearing objections, make such alterations in the valuation of any hereditaments included in any valuation list, and insert therein any rateable hereditament omitted therefrom, and make such corrections in names, descriptions, and particulars in any valuation list, and upon such information as to them may seem sufficient . . . . and when the committee have heard and determined all such objections as aforesaid, and have made such alterations, insertions, and corrections in any valuation list as to them may seem proper, they shall approve the same under the hands of three members of the committee present at the meeting at which the same is approved, with the date of such approval."

Sect. 21: "Where the committee make any alteration in the valuation of any hereditaments included in, or insert therein any rateable hereditament omitted from, any such valuation list, they shall cause such valuation list, with such alteration or insertion, to be deposited for inspection in manner hereinbefore provided concerning the valuation list made by . . . . the overseers, and shall cause the like notice to be given of such deposit as is required in the case of a valuation list so made . . . . as aforesaid, and shall appoint a day, not less than seven days nor more than fourteen days from the redeposit of such valuation list, for the hearing of any objections to the valuation list as so altered; and when the committee have heard and determined any such objections, or have made such further alterations, insertions, and corrections in such valuation list, they shall approve the same in manner hereinbefore provided."

By the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 5, provision is made for the appointment of assessment committees within the metropolis.

Sect. 6: "The overseers of every parish to which this Act extends, within the time in this Act mentioned, shall make and sign a valuation list of their parish in duplicate, in accordance with this Act."

Sect. 7: "After the valuation list is signed by the overseers, the same proceedings shall be had as are directed by the seventeenth, eighteenth, nineteenth, twentieth, and twenty-first sections of" the Union Assessment Committee Act, 1862, "subject to the alterations made by this Act."

Sect. 13: "If the overseers of any parish fail to transmit such a valuation list as is required by this Act, the assessment committee shall appoint some person to make a valuation list, and may allow such person such remuneration in addition to his expenses as they think fit; and all expenses incurred by the assessment committee in pursuance of this section shall be paid by the guardians, and charged by them to such parish. The person so appointed shall have for the purposes of this section the same powers and

later than seventeen, days after notice was given of its deposit, that is, at some time about the middle of June; it was not transmitted until the 18th of October: it ought to have been

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duties as overseers, and the valuation list so made shall be dealt with in the like manner as if it had been duly made and transmitted by the overseers."

Sect. 14: "The assessment committee, within the time in this Act mentioned, shall revise the valuation list in accordance with this Act and the Acts incorporated herewith. When they have finally approved such valuation list, they shall cause the totals of the gross and rateable value in such list to be ascertained and inserted in the list, and three members of the committee present at the meeting at which the list is finally approved shall sign at the foot thereof" a "declaration of approval and certificate of compliance with this Act."

Sect. 16: "The certified valuation list so sent to the clerk of the managers of the metropolitan asylum district by the assessment committee shall be deposited at the office of such managers, and within the time in this Act mentioned, shall be returned by such clerk to the same assessment committee."

Sect. 17: "The clerk of the managers of the metropolitan asylum district shall, within the time in this Act mentioned, cause the totals of the gross and rateable values of all the valuation lists to be printed."

Sect. 18: "In every petty sessional division in the metropolis the justices of the peace acting in and for such division shall, in every year at the time mentioned in this Act, hold a special sessions for hearing appeals under this Act against the valuation lists of the several parishes within such division."

Sects. 19, 20, 21, and 22 relate to the hearing of appeals before special sessions.

Sect. 23: "For the purpose of hearing appeals under this Act against any valuation list in the metropolis, the justices of the peace appointed as hereinafter mentioned shall at the time mentioned in this Act hold a court of general assessment sessions (in this Act referred to as the assessment sessions.)"

Sect. 33: "Notice in writing of every appeal, whether to special sessions or the assessment sessions, specifying the correction which the appellant desires to have made in the valuation list, must be served, within the time in this Act mentioned, on" certain persons therein specified.

Sect. 35: "If it appears to the justices in assessment sessions on any appeal that there is no approved valuation list for some parish, they may appoint some proper person (with such remuneration as they may appoint) to make a valuation list. Such person shall have for that purpose the same power and duties as overseers. The valuation list so made shall be deposited and otherwise made known to the persons interested in such manner as the Court may direct, but in manner as near as may be as is provided in this Act with respect to the list originally made. The costs of making such valuation list shall be paid by the assessment committee who failed to approve the list, and shall be deemed part of their expenses under the" Union Assessment Committee Act, 1862.

Sect. 42: "With respect to the times within which proceedings under this Act and the Acts incorporated herewith are to be done, the following provisions shall

1876

THE QUEEN v. INGALL.

finally approved before the 1st of November; it was not finally approved until the 21st of January, 1876. The provisions contained in the statute are imperative and not directory. Owing to the failure to observe the times appointed by the legislature, the appellants have been deprived of their statutory right to appeal to the special sessions which ought to have been held pursuant to the 18th and the following sections. By reason of this default on the part of the assessment committee, the appellants were obliged to give notice of appeal to the assessment sessions on the 14th of January, although the valuation list was not finally approved until the 21st of January; therefore, at the time of giving notice they did not know what was the amount at which their premises might ultimately be rated. The times prescribed in s. 42 depend upon one another; if any one period is not observed, the whole series may be thrown into confusion. Wherever a time for doing an act is mentioned, the language of the statute appears to be peremptory: ss. 6, 14, 16, 17, 18, 23, 33.

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have effect, that is to say, (1.) The overseers shall make and deposit the valuation list before the 1st of June in the first year after the passing of this Act; (2.) The overseers shall transmit the valuation list to the assessment committee not sooner than fourteen and not later than seventeen days after notice is given of the deposit of such list . . . (8.) The assessment committee shall finally approve and send the valuation list to the overseers and the clerk of the managers of the metropolitan asylum district before the 1st of November in the same year. . . (10.) The justices may hold the special sessions at any time after the 30th of November in the same year, which will enable them to determine all appeals before the ensuing 1st of January . . . (12.) Notices of appeals to assessment sessions shall be given on or before the 14th of January in the same year."

Sect. 43: "The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior Court, as so altered, shall come into force at the beginning of the year (commencing on the 6th of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned."

Sect. 46: "Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the 6th of April, one thousand eight hundred and seventy-one) shall be conducted as follows: . . . (2.) In the fifth year of every such period the overseers shall make a new valuation list . . . (6.) A new valuation list when it comes into force shall supersede the valuation list which was in force during the fifth year of such period."

1877

THE QUEEN v. INGALL.

H. Tindal Atkinson and *W. English Harrison*, for the respondents. It is submitted the provisions of s. 42 as to time are directory only, and not imperative. According to the argument for the appellants, a delay of merely one day in performing any one of the prescribed acts within the appointed time will render the valuation list null and void; this result cannot have been intended by the legislature.

[LUSH, J. Possibly a remedy is given by s. 35, which seems to provide for those instances where a valuation list has not been prepared.]

The appellants have suffered no substantial grievance; the only injury that they have sustained is that they have been deprived of the opportunity of appealing to the special sessions held under s. 18; but they had the right of appealing to the assessment sessions, and, as appears from paragraph 5, they fully availed themselves of this power. Upon the appeal the assessment was reduced, and having enjoyed that benefit, the appellants cannot now be heard to say that the valuation list is null and void; if their contention were correct, the parish of All Saints would for the five years beginning on the 6th of April, 1876, be without a valuation list, and the payment of the rates could not be enforced.

[LUSH, J. It seems to follow from s. 46, subs. 6, that until a new valuation list is made, the old list remains in force.]

Reg. v. *Chorlton Union* (1) may appear at first sight to be against the argument on behalf of the respondents, but that was not a case merely of delay; there one of the steps prescribed by the Union Assessment Committee Act, 1862, in making a valuation list, had been wholly omitted. It would lead to great inconvenience if it were held that the list is null and void; in many cases like the present the objection of inconvenience has had great weight in inducing the Court to decide that the language of a statute is only directory: *Reg.* v. *Fordham* (2); *Reg.* v. *Mayor of Rochester* (3); *Le Feuvre* v. *Miller*. (4) Moreover, from what is stated in paragraph 5, it is clear that the appellants submitted to the jurisdiction of the assessment com-

(1) Law Rep. 8 Q. B. 5.
(2) 11 A. & E. 73.
(3) 7 E. & B. 910; 27 L. J. (Q.B.) 45.
(4) 8 E. & B. 321; 26 L. J. (M.C.) 175.

1877

THE QUEEN v. INGALL.

mittee, and thereby they obtained a benefit by the reduction of the amounts at which they were originally assessed; they cannot now be heard to say that the valuation list is a nullity, for they are estopped by their own conduct.

Edward Clarke, in reply. The appellants could not avoid going before the assessment committee, for they wished to dispute the amount at which their property was assessed.

[MELLOR, J. The appellants took the chance of obtaining what they wanted from the assessment committee: they can hardly now urge that the committee had no jurisdiction to alter the list in their favour.]

The appellants could not at that time assume that the committee had no authority to correct the list; and if the provisions of s. 42 are imperative, the consent of the appellants could not confer upon the committee jurisdiction to hear objections to the assessment. Moreover, it is a general rule in the construction of statutes that where it is essential to do a thing at a specified time, it cannot be done at a subsequent time: *Bowman* v. *Blyth* (1); *Hunt* v. *Hibbs*. (2)

[LUSH, J. The decision in *Hunt* v. *Hibbs* (2) turned upon the question, whether a penalty imposed by statute for not doing an act at the proper time could be avoided by doing the act after the proper time.]

No penalty is imposed for a neglect to observe the days appointed by s. 42; no machinery is provided to ensure the performance at any time of the duties required; and this is a ground for holding that the provisions of s. 42 are imperative.

MELLOR, J. My mind has fluctuated a great deal in the course of the argument; but I think we are bound to hold that the sections of the Valuation (Metropolis) Act, 1869, cited before us are merely directory, and not imperative. No doubt, a valuation list ought to be made, deposited, transmitted, and approved of at the times fixed by s. 42, in order that any person dissatisfied with it may have a proper opportunity of appealing to the special or

(1) 7 E. & B. 26; 26 L. J. (M.C.) 57; in Ex. Ch. 7 E. & B. 47; 27 L. J. (M.C.) 21.

(2) 5 H. & N. 123; 29 L. J. (Ex.) 222.

assessment sessions; in the present case the necessary steps for perfecting the valuation list of the parish of All Saints were taken after the appointed days; but we should go extreme lengths if we were to hold that the list, which was finally approved of upon the 21st of January, was incapable of coming into effect. The appellants had full opportunity of appealing to the assessment sessions upon the merits of the case, and the list was confirmed, the amounts at which the appellants had been originally assessed having been previously reduced at their instance by the assessment committee. The real question is, whether the valuation list of the parish of All Saints, after it had been approved on the 21st of January, was a valid instrument: I have come to the conclusion that it ought not to be treated as a nullity; for I do not think that the legislature could have intended that the failure to observe the times fixed by s. 42 should be deemed to render void a valuation list. It has been argued that as the observance of those times is not enforced by a penalty, we ought to infer that the legislature intended to make the provisions as to the specified days imperative; but the general rule is that a person damnified by the failure to perform a statutory duty is entitled to maintain an action; and the legislature may have thought that the remedy by action is sufficient whenever any person has suffered loss or injury by the default or neglect of an assessment committee. The more reasonable construction is to hold that the terms of s. 42 are only directory, and that the valuation list was, after its final approval, a valid instrument. The decision of the assessment sessions was right, and must be affirmed.

LUSH, J. I am of the same opinion. We ought to look at the object which the legislature contemplated in passing the Valuation (Metropolis) Act, 1869; that object was that there should be a common basis of value throughout the metropolis; in order to carry out this scheme lists of rateable property throughout the metropolis are to be prepared once in five years; and in order to insure correctness appeals are allowed to both special sessions and assessment sessions. The machinery for effecting the intention of the legislature is created in numerous sections; and then, by s. 42, provision is made for the times at which the several acts should

1877

THE QUEEN v. INGALL.

be performed; every matter connected with the valuation list must be transacted before the 31st of March, for the list comes into force upon the 6th of April. It is, therefore, very important that every step should be taken within the prescribed time; but it has been argued that if at any stage of the proceedings the proper time for doing a specified act is allowed to elapse, the valuation list of the parish in which the default occurs will become wholly inoperative. Now, in the first place, it is to be observed that by ss. 13 and 35 provision is made for preparing valuation lists where there has been an omission to make them according to the requirements of the Act. This shews that the legislature contemplated the possibility of a list not being prepared in due time. So far as appears before us, the valuation list is correct in all respects, and can be acted upon. Our attention has been called to the circumstance that the observance of the times specified in s. 42 is not enforced by penalties; the omission is a little singular, and affords some ground for the argument that no delay in taking the necessary steps is to be allowed. But we must, in construing the Act, strike a balance between the inconvenience of holding the list to be null and void and the risk of allowing injury to be done by the delay in making the list; the former seems to me the greater evil, and therefore in my opinion we ought to hold the list to be valid. If no means of redress were allowed to a person who is by reason of delay wholly deprived of the right to appeal, that would, no doubt, be a hardship and amount to a defect in the Act; but in a case of this kind a remedy by action probably exists for the benefit of a person injured because there has been a failure to perform a public duty. But however that may be, I think that the decision of the assessment sessions was right, and must be affirmed.

Judgment for the respondents.

Solicitors for appellants: *J. & M. Pontifex.*
Solicitors for respondents: *Baker & Nairne.*

[IN THE COURT OF APPEAL.]

1877
Feb. 13.

GLEGG *v.* GILBEY.

Bankruptcy—Composition Deed—Liability of Surety—Construction.

B., having presented a petition for the liquidation of his affairs, the statutory majority of his creditors passed a resolution accepting a composition payable in three instalments, the last instalment to be guaranteed by the defendant. The defendant signed a guarantee accordingly, and a deed was made between B., the defendant, and certain persons called "the inspectors." The creditors of B. were also made parties to the deed, but some of them did not execute it. By the deed, after reciting that it had been agreed that, until payment of the composition, B. should carry on his business under the inspectors, it was provided that if B. should make default in the payment of it, or if it should appear to the inspectors, from the state of his business or otherwise, that the instalments would not be duly met, it should be lawful for them to apply to the Court of Bankruptcy to adjudge him a bankrupt, and without prejudice to this right it should be lawful for them in any such event to require him to assign all his property to them, as if they were trustees under liquidation proceedings, and further, that, "in the event of B. being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed before full payment of the composition, the defendant should be released from his guarantee." B., having made default in payment of the second instalment, was made bankrupt on the petition of a creditor who was not bound by the resolution, and had not executed the deed. After the bankruptcy he made default in payment of the third instalment:—

Held, affirming the judgment of the Queen's Bench Division, that the defendant was liable; as he could only be released from his guarantee by a bankruptcy procured by the inspectors under the provisions of the deed.

APPEAL from the judgment of the Queen's Bench Division in favour of the plaintiff on a special case. (1)

The case is set out at length in the report in the Court below.

Benjamin, Q.C., and *Willis*, for the defendant.

Russell, Q.C., and *Holt*, for the plaintiff, were not called on.

THE COURT (Mellish, L.J., and Baggallay, and Brett, JJ.A.) affirmed the judgment of the Court below, and on the same grounds.

Judgment affirmed.

Solicitors for plaintiff: *Lewis, Munns, & Longden.*

Solicitor for defendant: *Broughton.*

(1) Ante, p. 6.

1877 THE BUENOS AYRES AND ENSENADA PORT RAILWAY COMPANY
Feb. 2. *v.* THE NORTHERN RAILWAY COMPANY OF BUENOS AYRES.

Action for Rent of Premises situated Abroad—Jurisdiction of the English Courts—Domicile of Parties—Act of State.

Claim, stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station.

Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there; that the premises in question were constructed on land which was the property of the republic, and that the plaintiffs and defendants were joint concessionaires under the republic of certain easements appurtenant thereto. That the construction of the premises was directed by the government of the republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the republic powers of adjusting all rights arising out of the construction, and applicable to the claim of the plaintiffs were vested in the government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that the republic had assumed jurisdiction over the plaintiffs' claim:—

Held, on demurrer, that the defence was bad, as both parties to the action were within the jurisdiction of the English Courts, and the facts alleged did not shew that the Argentine Republic had exclusive jurisdiction over the claim.

DEMURRER to the first six paragraphs of the statement of defence, which are fully set out in the judgment of the Court.

Jan. 30. *Thrupp*, for the plaintiff, argued that the statement of defence was bad, as it did not shew that the Courts of the Argentine Republic had exclusive jurisdiction over the cause of action. The claim was for use and occupation of a railway station, and in such actions the venue was always transitory, so that *Whitaker* v. *Forbes* (1), where it was decided that an action could not be maintained by the devisee of a rent-charge upon land situate in Australia, has no application. But it is to be observed that even in that case Lord Chancellor Cairns said that the action might possibly now lie since the abolition of venues by the Judicature Act. *Mostyn* v. *Fabrigas* (2) decides that where the venue

(1) 1 C. P. D. 51. (2) 1 Sm. L. C. 5th Ed. 607.

is transitory, the English courts have jurisdiction over actions arising abroad.

Benjamin, Q.C. (*Mansel Jones* with him), for the defendants, argued that the defence to the action was not founded upon the venue, but upon the fact that the Argentine Republic, by an Act of State, had exercised control over the property in question. The republic had the same jurisdiction over the railway as the Board of Trade have over English railways. The Court would, therefore, having regard to the comity of nations, decline to entertain this claim.

Thrupp, in reply. It may be admitted that the Argentine Republic have jurisdiction over this claim, but the defence fails to shew that they have exclusive jurisdiction.

Cur. adv. vult.

Feb. 2. MELLOR, J. In this case, which was argued before me by Mr. Thrupp in support of the demurrer, and by Mr. Benjamin in support of the validity of the first six paragraphs in the statement of defence pointed at by the demurrer, I am of opinion that the plaintiffs are entitled to judgment, and that the demurrer must prevail. By the statement of claim the plaintiffs, who are a limited company, having their registered office at 8, Union Court, Broad Street, in the city of London, sue the defendants, whose registered office is at No. 40, Finsbury Circus, in the city of London, for certain rents, maintenance, and a certain sum for the defendants' share in the construction of certain lines of railway, building premises, and approaches to the central station in the city of Buenos Ayres, which the defendants were, in January, 1873, let into the beneficial use and occupation of, on the terms that they should pay to the plaintiffs' company annually the rent and maintenance for and of the said station, lines of railway, buildings, and premises, and the rent for the said approach usual in similar cases, and that the defendants have occupied and used the same and the said approach since January, 1873. To this the defendants, in the first six paragraphs of their statement of defence, plead that the plaintiffs' and defendants' companies are respectively domiciled in the Argentine Republic, and carrying on their business there. That the central station mentioned in the plaintiffs'

1877

BUENOS AYRES AND ENSENADA PORT RAILWAY CO. v. NORTHERN RAILWAY CO. OF BUENOS AYRES.

statement is constructed on land which is the property of the said Republic; and that the plaintiffs and defendants are joint concessionaires under the said Republic of certain easements appurtenant thereto, the rights of the plaintiffs not being in any way superior to those of the defendants, who further allege that the construction of the said central station was directed by the Government of the said Republic, and was for the benefit and convenience of the citizens of the said city of Buenos Ayres, and by the express provision of the laws of the Republic, powers of adjusting all rights arising out of the said construction properly applicable to the claim of the plaintiffs are vested in the Government, and that any express or implied contract which can be proved to exist between the plaintiffs and the defendants with respect to the distribution of the cost of the construction was made at Buenos Ayres, and is subject to the law of the place of contract. It then alleges that the Republic has assumed jurisdiction over the claim of the plaintiffs. The defendants then submit that as the claim relates to immoveable property, property situate in a foreign country, the High Court of Justice has not jurisdiction over the same, and that to assume it would be a violation of the comity of nations, and that the contract having been made at Buenos Ayres, it cannot be conveniently investigated before the High Court. These are the substantial allegations upon which this portion of the statement of defence is founded, and by which the defendants seek to oust the jurisdiction of this Court to entertain the claim.

Mr. Benjamin disclaimed any intention of arguing the case on any technical ground of venue. He rested his contention on higher grounds of policy and convenience and comity of nations. In looking carefully into the allegations made in the first six paragraphs of the statement of defence, I cannot find any allegation which claims or asserts exclusive jurisdiction in the Courts of the Argentine Republic to entertain this matter; and although suggestions are made and hints given, there is no specific allegation which can be fairly so interpreted.

It seems to me that, consistently with all these allegations, the plaintiffs are entitled to sue the defendants in this country in respect of the matters alleged in the claim. Both plaintiffs and defendants are in England, although they may be, as alleged, domi-

ciled in the Argentine Republic, they are not aliens, and there is nothing stated as to the law of the Republic or the contract of the parties which is inconsistent with the power to sue in England. Both parties to the action are within the jurisdiction of the Courts of this country, and the action, as far as procedure is concerned, has been properly initiated; and although it is alleged that, by the express provision of the laws of the Republic, powers of adjusting all rights arising out of the said construction properly applicable to the claim of the plaintiffs are vested in the Government, that does not shew that a contract by which a money compensation is agreed to be paid by the defendants to the plaintiffs for the beneficial use by the defendants of the plaintiffs' construction, may not be enforced before another forum. In short, I can find no allegation which asserts that jurisdiction over the subject-matter of the claim is, either by law or contract of the parties, vested exclusively in the Courts of the Argentine Republic. When the allegations contained in the statement of defence are carefully analysed, they amount to this only: that the contract was made in a foreign country, and that it relates to the use of property in such foreign country in which both parties have a domicile, and cannot be sued upon in this country, although both parties are within the jurisdiction of this Court. The alleged convenience of one tribunal over another for the investigation of the claim is beside the question of jurisdiction; and as to the allegation that to entertain the claim in this country would be a violation of the comity of nations, or, as was argued by Mr. Benjamin, be disrespectful to the Argentine Republic, that is, in my opinion, an assertion without any authority, and I cannot regard it. Lastly, he contended that, in deciding upon this question, we are dealing with an act of state. I confess myself unable to follow or see the effect of that argument, or how it arises upon the facts as alleged. It is true that the statement of defence asserts that the Government of the Argentine Republic has assumed jurisdiction over the plaintiffs' claim. I can see in that fact no act of state in the sense contended for by Mr. Benjamin, and it appears to me difficult to apprehend the effect of that allegation. A statement of defence which is intended by way of plea to the jurisdiction of the Courts of this country, must be precise and clear, which is certainly not

1877

BUENOS AYRES AND ENSENADA PORT RAILWAY CO. v. NORTHERN RAILWAY CO. OF BUENOS AYRES.

the case with the allegations in question. I cannot, carefully reading the allegations in the statement of defence, find any obstacle to my giving judgment in favour of the demurrer.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Bircham & Co.*
Solicitors for defendants: *Ashurst, Morris, & Co.*

Applied. THORPE *v.* FASEY. [1949] Ch. 649

Applied. THORPE *v.* FASEY. [1949] 2 All E.R. 393.

Feb. 6.

THE SHEFFIELD NICKEL AND SILVER PLATING COMPANY, LIMITED *v.* UNWIN.

Company—Agreement for Purchase of Business—Vendor guaranteeing Dividend—Resolution to release Vendor from Liability—Fraud—Right to rescind.

By agreement between the defendant and the promoters on behalf of an intended company the defendant agreed to sell to the company several patents belonging to, and several businesses carried on by, him. The company was incorporated under the Companies Acts, 1862 and 1867, the memorandum of association describing the objects of the company, amongst others, as the purchasing or acquiring the businesses and patents belonging to the defendant, and working the patents. The articles of association, which were dated and registered on the same day as the memorandum of association, set out the agreement with the defendant, and declared that it should be binding upon the company and read as part of the articles themselves. By the agreement itself, the defendant was to be chairman of the board of directors and managing director of the company for five years, and to be paid such salary as the company might determine. The purchase-money was to be paid the defendant, part in fully paid-up shares and the balance by instalments in money. The defendant on his part promised to guarantee to the company a minimum dividend of 15*l.* per cent. on all the paid-up capital of the company. The company carried on the businesses for one year under the agreement, and the defendant paid them the amount sufficient to make up the 15*l.* per cent. Shortly afterwards a resolution was passed by the directors and carried at a general meeting duly convened for the purpose, whereby the defendant was released from his guarantee upon surrendering his shares and giving up to the company his right to certain patents. The defendant retired accordingly from his office as director, giving up his shares and right to the patents, and the company proceeded to sell one of the businesses and one of the patents. The company afterwards claimed to set aside the resolution and enforce the guarantee, on the ground that the defendant had fraudulently misdescribed the property sold by him:—

Held, first, that the resolution was not in excess of the powers of the company, and was binding on them: secondly, that assuming that the resolution had been passed in consequence of fraudulent misrepresentations on the part of the defendant, his position had been so far changed that it was too late for the company to repudiate their contract.

ACTION upon an agreement whereby the defendant guaranteed

to the plaintiffs a dividend on their paid-up capital of not less than 15 per cent. for five years from the 1st of June, 1873.

The material part of the pleadings and facts is contained in the judgment of the Court.

At the trial, before Mellor, J., at the Leeds spring assizes, 1876, a verdict was found for the plaintiffs for 2370*l.* 10*s.*, with leave to move to enter judgment for the defendant, the Court to have power to draw inferences of fact.

May 25, 1876. The case was argued upon motion for judgment before Cockburn, C.J., Mellor and Quain, JJ., who took time to consider their judgment, but in consequence of the death of Quain, J., the Court ordered that the case should be re-argued.

Jan. 22, 25, 1877. *Cave, Q.C.* (*Forbes* with him), moved for judgment, and cited *Riche* v. *Ashbury Carriage Co.* (1); *Bonar* v. *Macdonald* (2); *Whitcher* v. *Hall* (3); *Morgan's Case* (4); *Smith* v. *Goldsworthy* (5); *Behn* v. *Burness* (6); *Pust* v. *Dowie* (7); *Clarke* v. *Dickson* (8); *Brown* v. *Brown.* (9)

Waddy, Q.C. (*Barker* with him), for the plaintiffs, cited Lindley on Partnership, vol. i. 3rd ed. p. 619; *Const* v. *Harris* (10); *Hutton* v. *Scarborough Cliff Hotel Co.* (11); *Smith* v. *Hughes* (12); *Melhado* v. *Hamilton* (13); and the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 14, 15, 16, 17, 18, 50, 51.

Cur. adv. vult.

Feb. 6. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. This is an action to recover the sum of 2370*l.* 10*s.*, the amount required to make up the second year's dividend to 15 per cent. upon the paid-up capital of the company, and it is based upon the guarantee of the defendant, contained in the

(1) Law Rep. 7 H. L. 653, 667.
(2) 3 H. L. C. 226.
(3) 5 B. & C. 269.
(4) 1 Mac. & G. 225.
(5) 4 Q. B. 430.
(6) 3 B. & S. 751; 32 L. J. (Q.B.) 204.
(7) 5 B. & S. 20, 33; 34 L. J. (Q.B.) 127.
(8) E. B. & E. 148; 27 L. J. (Q.B.) 223.
(9) 35 L. T. 54.
(10) T. & R. 518.
(11) 2 Dr. & S. 514; 34 L. J. (Ch.) 643.
(12) Law Rep. 6 Q. B. 597.
(13) 29 L. T. 364.

1877

SHEFFIELD NICKEL CO. v. UNWIN.

agreement of the 28th of May, 1873, whereby the defendant, as the vendor, guaranteed to the company a dividend on all the paid-up capital of not less than 15 per cent. per annum for five years from the first of June then next. The defence set up was, that by a resolution of the directors, sanctioned by an extraordinary general meeting of the shareholders, and duly confirmed, as required by the Companies Act of 1862, the company agreed to release him from all liability under his guarantee upon certain conditions, which he alleged he had performed. To this the plaintiff company replied, first, that the resolution was ultra vires the company, and therefore void; secondly, if not ultra vires, that the defendant had not performed the conditions.

The memorandum of association describes the objects of the company to be as follows:—

First, the carrying on for profit or gain, of all or any or either of the trades or businesses of manufacturing, purchasing, selling, letting, or supplying silver, German silver, brass, electro-plated and Britannia metal wares and goods.

Secondly, "the purchasing or acquiring the several trades or businesses now carried on or belonging to John Unwin" (the defendant), "that is to say, the trade or business carried on by him under the style or firm of John Brook & Son, at the Globe Works in Sheffield," and various other businesses specified.

Thirdly, the purchasing, acquiring, and working the several English and foreign patents granted or belonging to the said John Unwin in his own name or in the joint names of himself and John Walkland for the manufacture of self-acting fountains, or for the depositing of nickel upon metal, and preparing articles to be coated for the reception of the nickel coating respectively, and for the granting of licences for the use of the said patents, or either of them, and the receipt of royalties therefrom.

Fourthly, the purchasing and taking assignments of any letters patent or other like instruments granted or to be granted for inventions which may appear conducive to the attainment of the objects of the company, or any of them, and the using, working, or adopting the several inventions for which the same are or shall be granted, or the taking any licence or licences under any such letters patent, or instruments for the using or working of any such inventions.

Fifthly, the purchasing or taking on lease, or otherwise, for any estate or interest, any lands or buildings, or erecting any buildings, works, offices, fixtures, machinery, or other things in England or elsewhere, which may from time to time be deemed necessary or advantageous for carrying out the purposes of the said company.

Sixthly, the letting on lease or otherwise, and the selling or mortgaging, or in any way disposing of the real or personal property of the said company.

Seventhly, the entering into any arrangement with any other company, or any person or persons, for the purchasing or otherwise acquiring their or his business, or businesses being of a like nature with the business of the company, or some branch thereof; or for the purchasing the co-operation of any such company, or person or persons, or any of their or his rights or property, or otherwise to amalgamate or make arrangements with any such company, or person or persons, for the purposes aforesaid.

Lastly, the doing all such other matters and things as are incidental or conducive to the attainment of the above objects.

The articles of association, which are dated and registered on the same day as the memorandum of association, begin with setting out in full the contract of sale of the business between the defendant and the promoter on behalf of the company, and the fourth article confirms and adopts the agreement, and declares it to be binding upon the company, and that it shall be read and construed with and as part of the articles themselves. Turning back to the agreement, we find the material terms of it, as bearing upon the question of ultra vires, to be, (7.) That the defendant shall be chairman of the board of directors, and managing director of the company for five years from the 1st of June, 1873, and shall, while such managing director, devote so much time to the affairs of the company as may be necessary for the efficient working and management thereof; and shall be paid from time to time such salary as the company may from time to time determine. (9.) The purchase-money to be paid to the defendant as follows, viz. 2000*l.* in fully paid-up shares, to be issued by the company in the name of the vendor, 1000*l.* in fully paid-up shares in the name of Marriott (of whom the defendant had agreed to purchase one

1877

SHEFFIELD NICKEL CO. v. UNWIN.

of the businesses to be transferred, upon which nothing turns), and the balance in cash, namely, 2500*l.* on the registration of the company, 2500*l.* on the 1st of August then next, and the balance within six calendar months of the registration. Then comes the clause upon which the action is brought, and which is the only other material clause. It is in these terms: "The vendor will guarantee to the said company a dividend on all the paid-up capital of not less than 15*l.* per cent. per annum for five years, from the 1st day of June next, with power for the directors of the said company to declare interim dividends." Some of the articles it is important here to advert to. The 13th article says that "the certificates of any shares which may be issued under special conditions shall indicate the special conditions under which the same shares are issued, and in case of the vendor's shares, the words 'not transferable, and subject to vendor's guarantee,' shall be considered to be a sufficient indication within the meaning of this article." The 14th article gives the company a first and permanent lien upon all the shares of any member for all moneys due from him to the company.

The 95th article ordains that the directors (who are named in the 94th article), other than the defendant, shall continue in office until the first general meeting; but the defendant shall continue for the term and upon the conditions mentioned in the agreement herein before recited.

By the 96th article the qualification of a director was to be the holding of not less than fifty shares in his own right.

The 109th article provides for the removal of any director by special resolution, but the article was not to affect the defendant until after the 1st of June, 1878, or until he should at any time during that period fail to carry out any or either of the conditions set forth in the agreement, and on his part to be observed and performed.

The 129th article vests in the directors large powers, amongst which are power to enter into, or adopt and carry into effect, any contracts or agreements for any of the purposes of the company, upon any terms or subject to any conditions they may deem beneficial, and to alter, vary, or modify any of such contracts or agreements as they may think fit, to bring, defend,

compromise, refer to arbitration, and abandon legal and other proceedings and claims by and against the company, and the directors and officers of the company, or otherwise concerning the affairs of the company, and generally to adopt all other measures and do all such acts as they may consider advisable for the proper and efficient carrying on of the business of the company, or likely in any other respect to be advantageous to the company.

The 189th article, under the head "dividends," declares that "for five years from the 1st of June, 1873, dividends shall be made, and all acts and proceedings in relation thereto shall be done and taken, in accordance with the said agreement confirmed by article 4, and the several provisions herein contained in relation thereto shall operate subject to the provisions of the same agreement."

It will be useful, before we proceed to the state of things which led up to the alleged release, to review the position and rights of the shareholders on the one hand and the defendant on the other. The shareholders were to have the benefit of the defendant's services in managing for five years the businesses which it must be presumed he had successfully carried on, and the security of his guarantee that the business should yield, or that he would make up, a minimum dividend of 15 per cent., and his 200 fully paid-up shares, which he was not at liberty to dispose of, were to stand as a security for the fulfilment of his contract. On the other hand, the defendant had the advantage of a largely increased capital to work with, from which all parties expected to realise large profits. He had 200 paid-up shares, upon which he was entitled to dividends, and the position of managing director with a salary for five years, from which position he could not be removed unless he failed to carry out the conditions of the agreement which on his part were to be performed. At the time of passing the resolution to release him the defendant had not made any default. He had managed the entire business of the company, and had paid the deficiency on the first year's dividend, so that on the 30th of April, 1874, when it was resolved to get the sanction of a general meeting to an arrangement which had evidently been agreed upon between him and his co-directors, and which included as one of its terms the release of his guarantee,

1877

SHEFFIELD NICKEL CO. v. UNWIN.

he could not have been removed from his position of managing director.

But as early as February, 1874, we find, from the evidence, that one at least of the concerns was not working satisfactorily, and the directors were anxious to get rid of it.

On the 18th of February it was resolved, against the will and protest of the defendant, that "Mr. Unwin not having been able to meet with a purchaser for the business, and the directors feeling quite sure that the business carried on at the Rockingham Works is not paying, they deem it expedient to stop the manufacture of any goods but what are already commenced, and to dismiss all the workpeople that they can manage to do without as soon as practicable." It does not appear whether this resolution was acted upon or not, but on the 28th of April the directors resolved that a "Meeting of shareholders be convened at an early date for the purpose of taking the sanction of the shareholders to dispose of the electro-plated and manufacturing business now carried on at Rockingham Works, and also to dispose of the premises."

On the 30th of April the directors met again, and passed the resolution which gave rise to the present litigation. The resolution is in these terms: 1st. "That a meeting of shareholders be convened at an early date for the purpose of taking the sanction of the shareholders to dispose of the electro-plated and manufacturing business now carried on at the Rockingham Works, and also to dispose of the above-mentioned premises. And we also recommend that our managing director, Mr. John Unwin, be released from his guarantee of 15 per cent. on the conditions named below, viz. that should the directors and shareholders free the managing director from his liabilities and responsibilities, he will surrender his 200 shares fully paid up, amounting to 2000*l.*, and also give the right of five new patents, together with such assistance as may be required for the disposal of the estate, free of charge to the company."

2. "That in consideration of the surrender of seventy fully paid-up shares amounting to 700*l.* by Mr. John Unwin, the managing director, a claim against him due to the company be cancelled."

It does not appear whether these seventy shares were part of the 100 shares issued to Marriott on special conditions or not. Nor is

it material to inquire. It is certain that they were no part of the 200 shares allotted to the defendant as vendor in his own name. At the meeting of shareholders convened pursuant to the foregoing resolution on the 11th of May, a report was presented by the directors, including the defendant, to the effect that the defendant had no means of paying the guaranteed dividend, and that his only available property consisted of his shares in the company and his interest in five new patents. The resolution, in its entirety, was thereupon put and carried, an amendment being rejected, and at a second meeting called for the purpose, the resolution was duly confirmed.

The defendant had no other shares than those which he agreed to surrender, and the effect of the arrangement therefore was, and probably the object of it, to compel the defendant to vacate his place at the board, the possession of fifty shares being a necessary qualification of a director. Accordingly, after the confirmation of the resolution, he retired, and another gentleman was appointed, who thenceforth acted as managing director. The certificates of the 200 shares were produced by the defendant at the meeting of directors when the resolution in question was passed, and were then placed in a cupboard in the directors' office, and after the retirement of the defendant, were taken possession of by his successor and retained. No transfer of these shares to the company was ever given, nor was it at any time asked for. As we are to draw inferences, we are of opinion and find that the defendant was ready and willing to transfer and would have transferred them if he had been required to do so. Before stating our opinion upon the first point it will be convenient to complete the narrative of facts as disclosed by the evidence. On the 13th of May, two days after the first extraordinary general meeting, at which the resolution to release was confirmed, and as if in anticipation of the defendant's retirement from the office of managing director, a resolution was passed by the directors that "Mr. John Unwin having proffered his services free of cost to assist in the disposal of the business, plant, &c., at Rockingham Works, we also appoint him manager of the nickel and bronzing department at Globe Works, under the direction of the board, and for such services rendered he shall be remunerated as the board may consider

1877

SHEFFIELD NICKEL CO. v. UNWIN.

desirable from time to time; but to have no claim for services rendered otherwise than by a special resolution relating thereto by the board."

Some months after the defendant's retirement from office, and after a new managing director was appointed, the defendant was applied to for the five patents, and it then appeared that all he had was one patent and four provisional specifications, all of which were out of date, so that at that time he had not as to the four even an inchoate patent right to hand over. Upon this a meeting of the directors was held, at which they resolved "that inasmuch as Mr. John Unwin has not complied with the terms of a special resolution which released him from his guarantee of 15 per cent. on the called up capital of the company by giving up five patents, stated in the resolution as part of the terms of the said resolution, the directors consider the said resolution null and void." This resolution was sanctioned and confirmed by general meetings, and was served on the defendant before action brought. It was alleged at the trial that the defendant had wilfully misrepresented to the directors that he held five complete patents, but, this the jury negatived, though they found that the directors so understood. They also found that it was part of the bargain that the defendant should assign five new patents, and that he never explained that four of them were only provisional specifications out of date.

Upon the first question, namely, whether the resolution to release was ultra vires the company, our judgment is in favour of the defendant. The resolution in no way affects the constitution of the company, as defined by the memorandum of association, but being, as it undoubtedly was, bonâ fide on the part of the directors and shareholders, who considered that they were doing the best for their own and the interests of the company, is in furtherance of the main object of the company. We doubt whether such an arrangement would not have been within the competence of the directors themselves in the exercise of the very extensive powers given them by the 129th article; but we are clearly of opinion that it was intrà vires the company, and that the agreement to guarantee 15 per cent. cannot be put higher than a "regulation," which, by the 50th section of the Company's Act, 1862, the com-

pany had power to repeal or alter. It was strongly urged by Mr. Waddy that this was a vital clause, because persons intending to purchase shares would naturally look to the registered articles and be induced to trust to the guarantee which they would find there; but the answer to this is, that treating this clause as a "regulation" the repeal of it must be registered also, and thus appear to be, as in fact it was, an amendment of the original articles.

The argument on the second question presented the case of the company in a twofold aspect. The resolution to release was, it was contended, in terms conditional upon the defendant surrendering the shares and assigning five valid patents, and as this has not been done, the defendant could not set up the resolution as a bar; or, secondly, if not a conditional contract, it was a contract procured by fraud, inasmuch as the defendant knew that he had not five valid patents or patent rights to assign, and in this view of the case the company were justified in repudiating, and that they did repudiate as soon as they became aware of the fraud.

We think that in whichever aspect the contract is viewed neither of these arguments affords an answer to the defendant's case. A conditional contract ceases to be conditional when the party has received a substantial part of the consideration: *Behn* v. *Burness* (1); *Pust* v. *Dowie*. (2) A contract voidable for fraud cannot be avoided when the other party cannot be restored to his status quo: *Clarke* v. *Dickinson*. (3) For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded in toto, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages.

Now, the company, it is clear, accepted the 200 shares, treated the defendant in virtue of his surrender of them as no longer qualified to act as director, and appointed another managing director in his stead. By him the businesses were carried on for upwards of four months before the directors resolved to repudiate the agreement under which the shares had been given up. And in the meantime they disposed of one of the businesses, the

(1) 3 B. & S. 751; 32 L. J. (Q.B.) 204.

(2) 5 B. & S. 20, 33; 34 L. J. (Q.B.) 127.

(3) E. B. & E. 148; 27 L. J. (Q.B) 223.

1877

SHEFFIELD NICKEL CO. v. UNWIN.

resolution for selling which was part of the resolution of the 11th of May, which sanctioned the release of the defendant from his guarantee, and evidently part of one entire arrangement. They also sold one of the patents which was included in the original purchase, and they retained and had the benefit of the patent, one of the five, which was part of the consideration for the release. It is true they had not disposed of the shares, or the last-mentioned patents, nor had they taken a transfer of the shares; but it is clear that the return of these would not have restored the defendant to, or placed the concern in, the same condition in which he or it was at the date of the resolution to release. The position of both parties had been materially altered, and it was therefore too late in October to repudiate the contract.

For these reasons we are of opinion that this action, which is brought to enforce the guarantee, cannot be sustained, and our judgment must consequently be for the d efendant.

Judgment for the defendant.

Solicitor for plaintiffs: *Hickin.*
Solicitor for defendant: *H. A. Maude.*

Jan. 22.

[IN THE COURT OF APPEAL.]

HOPKINS AND OTHERS *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Ferry — Disturbance — Bridge — Railway Company — Compensation — Lands Clauses Consolidation Act (8 *Vict. c.* 18), *s.* 68—*Railway Clauses Consolidation Act* (8 *Vict. c.* 20), *s.* 6.

The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

Quære, whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat.

A railway company, under the authority of their Act, constructed across a river, half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railway Clauses Acts.

Held, reversing the decision of the Queen's Bench Division, that no compensa-

tion could be recovered: First, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an Act. Secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act.

Reg. v. *Cambrian Ry. Co.* (Law Rep. 6 Q. B. 422) overruled.

ACTION by the plaintiffs, as owners of a ferry, against the defendants, for the recovery of 300*l.*, the amount of an award, made between the parties in a question of disputed compensation, by an umpire appointed in accordance with the provisions of the Lands Clauses Consolidation Act, 1845.

A case was stated for the opinion of the Court as follows:—

1 and 2. Statement that the plaintiffs, as trustees of the will of Charles Boucher, were owners in fee of a certain ancient and exclusive ferry over the navigable river Nene.

3. Before and until the construction of the bridge by the defendants, as hereinafter mentioned, the ferry was extensively used for the conveyance across the river by the plaintiffs and their predecessors, owners of the said ferry, or their under-tenants, of passengers by horse and foot, goods, horses, sheep, cattle, and carriages, and was, down to the said time, the only public means of communication within about six miles between the north and south sides of the river, which is at this spot navigable and about 100 feet in breadth. It increases in width towards its mouth, and for some miles upwards is of considerable breadth, and navigable for barges. It connects two high roads, the one to the north leading from the ferry to Wisbeach and Peterborough, and the other to the south from the ferry to March, Chatteris, and so to Ely and Cambridge.

4. By the Great Northern Railway (Spalding to March) Act, 1863, the defendants were authorized to make a railway from Spalding to March, and to make a bridge, footway, and works across the river in connection therewith.

5. The defendants, in pursuance of and in exercise of the powers contained in the said Act, constructed a bridge and footway attached to it across the River Nene, which bridge and footway are on the west side of or above the said ferry, and are distant from the landing-places of the said ferry about half a mile.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

5A. The said bridge and footway are physically independent of and unconnected with the said ferry, and in no way physically obstruct the same or the approaches thereof.

6. The bridge and footway are and have been, since they were opened by the defendants in or about the year 1867, used for the railway traffic of the defendants, and also for the passage of passengers on foot across the Nene to and from the station called "Guyhirn," situated on the south side of the said river. The said foot-bridge has not been dedicated to the public. The passage of stock, and sheep, and of barrows across the said foot-bridge is prevented by stiles placed for the purpose at either end. Notices are put up near the bridge as follows (on the north side): "Great Northern Railway. Notice. Any person found trespassing on the railway will be prosecuted. By order. Alexander Forbes, secretary. November 4th, 1870." At the south end of the bridge a notice is fixed: "To the station only." There are no steps beyond these taken to prevent persons not intending to use the bridge as an access to the station from using it, and persons do in fact use it occasionally simply for the purpose of crossing the river.

7. The transit of goods, horses, sheep, cattle, and carriages is carried on by means of the defendants' trains, and such goods horses, sheep, cattle, and carriages must be put upon their railway at some or one of their stations, the nearest of which on the north side is about two and a half miles, and on the south side is the Guyhirn station adjoining the bridge and footway. In connection with the last-mentioned station there is also accommodation for loading trains at the north end of the bridge and footway.

8. Neither the said bridge and footway, nor any of the said works, communicate with the said ferry, inasmuch as it is half a mile distant, but persons travel by the trains on the said railway across the said bridge who otherwise would have used the said ferry as a means of transit. Stock, cattle, and sheep are also carried by the said railway over the said bridge which otherwise would have crossed the ferry.

9. Since the erection and opening of the bridge, footway, and

works, the traffic over the ferry of all descriptions, including foot-passengers, fell off, and the franchise of the ferry, and the plaintiffs' interest therein, became less valuable, and they were compelled to reduce the rents received by them from the tenants of the ferry, and ultimately the ferry was given up.

10. In consequence of this prejudicial effect on the plaintiffs' ferry, the plaintiffs, on the 24th of February, 1872, caused to be served on the defendants a notice in writing stating therein the nature of their interest, their claim to compensation in respect of the injury thereto, and their desire to have the said question of disputed compensation settled by arbitration in accordance with the provisions of the statutes in that behalf.

The case then stated the proceedings under the arbitration, and the appearance of defendants under protest before the umpire, who made his award in favour of the plaintiffs for 300*l.*

A plan was annexed to the case, shewing a road on one side of the river leading from Peterborough to Wisbeach, and an approximately parallel road on the other side leading from March to Wisbeach, with the ferry affording means of passing from one of the roads to the other. The Lands Clauses Consolidation Acts and the Railways Clauses Consolidation Act were incorporated in the Great Northern Railway (Spalding to March) Act, 1863.

The question for the opinion of the Court was, are the plaintiffs entitled to recover the sum so awarded?

May 9, 1876. The case came before the Queen's Bench Division (Blackburn and Quain, JJ.), who, being of opinion that it was governed by *Reg.* v. *Cambrian Ry. Co.* (1), gave judgment for the plaintiffs.

The defendants appealed.

Nov. 10, 21, 1876. *Mellor, Q.C.*, and *Monckton*, for the defendants. There is this distinction between this case and *Reg.* v. *Cambrian Ry. Co.* (1), that there the company took toll for the use of their bridge; here the company only use the bridge for the purposes of their station. What they have done has been done under the

(1) Law Rep. 6 Q. B. 422.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

authority of their Act, and the injury, if any, to the ferry is by the working, not by the construction, of the railway, and is, therefore, not a subject for compensation under the Acts: *Brand* v. *Hammersmith Ry. Co.* (1); *M'Carthy* v. *Metropolitan Board of Works.* (2) But the plaintiffs also complain of injury by reason of the traffic in carriages and animals being taken away. That, however, is no subject for compensation: *Newton* v. *Cubitt.* (3) The legislature has thought fit to leave such cases unprovided for. If the railway had interfered physically with the ferry the damage would have been the subject of compensation under the Acts, but that is not the case here. A ferry owner cannot stop all improvement by setting up an exclusive right to take people across a river for an indefinite distance.

F. M. White and *Silvester* for the plaintiffs. There has been no change of circumstances, nor is this ferry in a populous place, as in *Newton* v. *Cubitt.* (3) The ferry is from one high road to the other, and was granted for the convenience of the district, and is now given up. The owner of the ferry is bound to maintain the ferry, and has a right to the traffic. Even he could not put up a bridge: *Payne* v. *Partridge.* (4) The plaintiffs do not want to stop any improvement, and want merely 300*l.* to compensate them for the loss of their undoubted property, just as a landowner would be compensated. The injury is directly traceable to the execution of the powers given by the Act. In *Brand* v. *Hammersmith Ry. Co.* (1), the damage was remote; here it is direct, for every passenger who crosses the bridge would have crossed by the ferry: *Cory* v. *Yarmouth and Norwich Ry. Co.* (5) A bridge could not be built to the injury of the ferry: *Letton* v. *Goodden.* (6) In *Churchman* v. *Tunstal* (7) it was held that a waterman could not carry passengers across a river three quarters of a mile from a ferry: See also *Attorney General* v. *Richards* (8); *Huzzey* v. *Field.* (9) At all events, the plaintiffs have been injuriously affected within the Lands Clauses Consolidation Act (8 Vict. c. 18),

(1) Law Rep. 4 H. L. 171.
(2) Law Rep. 7 H. L. 243.
(3) 12 C. B. (N.S.) 32; 31 L. J. (C.P.) 246.
(4) 1 Salk. 12.
(5) 3 Hare, 593.
(6) Law Rep. 2 Eq. 123.
(7) Hardr. 162.
(8) 2 Anstr. 603.
(9) 2 C. M. & R. 432.

s. 68, and the Railway Clauses Consolidation Act (8 Vict. c. 20), ss. 6, 16, and are entitled to compensation.

Mellor, Q.C., in reply.

Cur. adv. vult.

Jan. 22, 1877. The judgment of the Court (Lord Coleridge, C.J., Mellish, L.J., and Brett and Amphlett, JJ.A.), was delivered by

MELLISH, L.J. This was an appeal from a judgment of the Queen's Bench Division on a special case. [The Lord Justice read the material facts from the special case.] The Queen's Bench Division gave judgment in favour of the plaintiffs upon the authority of the case of *Reg.* v. *Cambrian Railway Company* (1), and we agree that the present case, except in one point, which will be hereafter referred to, cannot be distinguished from that of *Reg.* v. *Cambrian Railway Company* (1), and that we have to consider whether that case was rightly decided.

There are two questions to be considered: First, could an action have been maintained by the plaintiffs against the defendants, if the defendants' railway bridge and foot-bridge had been erected without the authority of an Act of Parliament? And, secondly, if such an action could have been maintained, are the plaintiffs nevertheless prevented from recovering compensation, upon the ground that they have not suffered damage from the construction of the railway, but only from the user of the railway after it was constructed, and that the case is therefore governed by *Brand* v. *Hammersmith Ry. Co.?* (2)

With respect to the first question, in *Reg.* v. *Cambrian Ry. Co.* (1) it appears to have been admitted by the counsel for the company, that the owner of a ferry could have maintained an action against the owner of a railway not constructed under the authority of an Act of Parliament in respect of the diversion of traffic from his ferry by the opening of the railway; and therefore the question, whether such an action could be maintained was very little considered; but Mr. Justice Blackburn says: "The prosecutor's right is to a ferry or franchise by which he had the exclusive right of carrying passengers across the river. It is well-established that if that right is interfered with, without the authority

(1) Law Rep. 6 Q. B. 422. (2) Law Rep. 4 H. L. 171.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

of an Act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action would lie for that disturbance. The cases, so far as I remember them, in which actions have lain for the interference with or disturbance of the right of ferry, have been where there has been a carrying across by boats. But I cannot bring my mind to doubt the principle, that if a bridge were to be erected across a ferry, and people were to go across the bridge, and consequently the bridge would have the effect of disturbing the owner of the ferry in his right, he would be entitled to bring an action on the case and recover damages. It follows, I think, that what the railway company have here done, not only in making a bridge for carrying railway traffic across, but actually a footway, and taking toll from foot-passengers for passing from one side to the other, if that had not been authorized by Act of Parliament, would have been a disturbance of the ferry, for which the owner of the ferry could have brought an action on the case" (1). In the present case, the railway company have erected and opened both a bridge to carry the railway traffic, and a foot-bridge, but the facts as to the user of the foot-bridge are different from what they were in *Reg.* v. *Cambrian Ry. Co.* (2); and it seems desirable to consider separately, whether an action could have been maintained in respect of the diversion of traffic by means of the railway bridge, and whether an action could have been maintained in respect of the diversion of traffic by means of the foot-bridge.

We will first consider that which is by far the most important, whether an action could have been maintained in respect of the diversion of traffic caused by the railway bridge. Now, in order that such an action may be maintained, it is clearly not sufficient for the owner of the ferry to prove that something has been done by which traffic has been diverted from his ferry. He must prove that his right has been violated. He is the owner of a particular description of monopoly, which the law allows to be created from its being presumed to be for the public advantage, and to maintain an action he must prove that the defendants have in substance done that which he has the sole right to do. Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carry-

(1) Law Rep. 6 Q. B. at p. 430. (2) Law Rep. 6 Q. B. 422.

ing passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry. In *Payne* v. *Partridge* (1) it was laid down, that the owner of a ferry could not himself build a bridge in substitution for the ferry; which seems a clear decision that he has not a grant of every mode of carrying goods and passengers across; for if he had he would surely be entitled, if not bound, to provide the best means of crossing. The first grantee of the ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in the particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. There is nothing in the nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances and future discoveries of an entirely different description of transit by which ferrying might be superseded. The Crown professes to protect the grantee against the competition of other persons who are in the same line of business and do the same thing that he does; but he appears to run the risk of any change of circumstances, which may render ferrying at that place useless.

There is no doubt, however, that the right of the owner of a ferry does extend somewhat beyond a mere right to bring an action against persons who have carried goods or passengers for hire by boat from one terminus of his ferry to the other, and it is necessary to examine the authorities for the purpose of seeing what the true limit of the right is. We have not been able to discover that any action has ever been brought by the owner of a ferry against any person for violating his right otherwise than by means of boats. The authorities, both old and new, are all collected in *Huzzey* v. *Field* (2) and *Newton* v. *Cubitt* (3), but they all relate to alleged infringements of the rights of the owner of a ferry by means of boats. They establish that although it is laid down in a very early case (4): "If I have a ferry by prescription, and another erects

(1) 1 Salk. 12.
(2) 2 C. M. & R. 432.
(3) 12 C. B. (N.S.) 32; 31 L. J. (C.P.) 246.
(4) 2 Roll. Abr. 140.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

another ferry on the same river near to it by which my ferry is injured, that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced;" and there are other authorities to the same effect; yet it does not conclusively follow, as a matter of law, that because a new ferry diverts some of the traffic from an old ferry it is actionable; and it may be that no action can be maintained in respect of the new ferry, if it has been set up bonâ fide for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry. In *Newton* v. *Cubitt* (1) there were two counts, the first complaining that the defendants had carried passengers in the line of the plaintiff's ferry, the second that they had so done near the said ferry for the purpose of evading it; and Mr. Justice Willes, after shewing that the defendants had not carried passengers in the line of the plaintiff's ferry, says: "The second count, charging that the defendants carried near the line of ferry for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way; and if the alleged wrong-doer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no material difference to travellers, such a wrong-doer would be guilty of the wrong complained of in the second count; he would indirectly carry in the line of the plaintiff's ferry" (2). Further on he says: "The principle by which to decide, whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway; and it is obvious that the single landing-place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics." Now this being the result

(1) 12 C. B. (N.S.) 32; 31 L. J. (C.P.) 246.

(2) 12 C. B. (N.S.) at p. 59; 31 L. J. (C.P.) at p. 253.

of the authorities, it seems to us by no means clear that a person building a bridge over a stream, even in the line of a ferry, would be liable to an action by the owner of a ferry. It is true that the opening a new bridge might be as prejudicial, or indeed much more prejudicial to the property of the owner of the ferry than the setting up of a rival ferry; but the one does, and the other does not involve the direct doing of the very thing the exclusive right to do which has been granted to the owner of the ferry; and it seems to be extending the principle of liability for an indirect violation of the rights of the owner of a ferry to an unreasonable extent, to hold that it extends to make a person liable to an action, who has not ferried or carried passengers by boat at all.

This, however, is not the point which we have to decide. It may be that if a person built and opened a bridge in the line of a ferry, so as to enable persons and goods to be conveyed from the highway on which one terminus of the ferry was situate to the highway on which the other terminus was situate, he ought to be held to have indirectly violated the rights of the owner of the ferry: but that is not what the defendants have done. The railway bridge does not join the highway on which one terminus of the ferry is situate to the highway on which the other terminus is situate. The passengers and goods which are conveyed over the railway bridge do not use the highway on each side of the river adjoining the ferry at all. They use the railway as a substitute for those highways as well as a substitute for the ferry. How can it be said that the defendants, by opening an entirely new highway of a different description from the old highways and the ferry for the general accommodation of the public, have either directly or indirectly violated the plaintiffs' right, their right being to have the exclusive ferrying of goods and passengers from the one side of the river to the other in that locality? Then the passages we have cited from Mr. Justice Willes's judgment in *Newton* v. *Cubitt* (1) seem strongly in the defendants' favour. From what is there said it would follow, that even if the railway bridge had never been made, but the railway company had established a new ferry for the purpose of conveying goods and passengers from their railway on one side of the river to their railway on the other side,

(1) 12 C. B. (N.S.) at p. 59; 31 L. J. (C.P.) at p. 253.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

it would not have been actionable, for the railway would have been a new highway on land, which a change of circumstances had rendered necessary, and it would be reasonable that the new highway should be allowed to be continued over the water highway. It is true that there was not in this case, as in *Newton* v. *Cubitt* (1), a change of circumstances in the immediate neighbourhood of the ferry, which rendered the new highway necessary, but there was a general change of circumstances in the country at large which rendered this new highway necessary, not only or principally for the accommodation of the persons who formerly used the ferry, but for the accommodation of a much larger portion of the public; and we cannot think that it would have been illegal or a violation of the rights of the owner of the ferry to have given the public that accommodation, even if the railway had been made without the authority of an Act of Parliament.

There is another consideration, which seems to us to be in favour of the defendants. If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways, or had a legal interest in the profits to be derived from the use of highways before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways and have received no compensation. No doubt their rights have not been infringed, though their property has been affected. They were all in substance the owners of particular kinds of highway. If any person used their highway without their permission and without paying their toll, the law gave them a remedy, but they had no remedy for a diversion of traffic caused by the invention of a better kind of highway. Is the owner of a ferry in a different position? We think he is not. We think he also is the owner of a particular description of highway, who is entitled to his legal remedy if anybody infringes upon his right, or uses his highway

(1) 12 C. B. (N.S.) 32; 31 L. J. (C.P.) 246.

without paying his toll, but that he, like the others, must bear the loss occasioned by the diversion of traffic caused by the introduction of railways. Another class of persons interested in highways may be referred to, more analogous to the owners of ferries. The Crown had exactly the same prerogative respecting bridges that it had respecting ferries. Suppose that the Crown had, in consideration of a person undertaking to keep perpetually in repair a bridge over a stream carrying a highway, granted to such person and his heirs a reasonable toll in respect of all persons and goods passing over the bridge; or, in other words, assume the existence of a good toll thorough in respect of a bridge. The owner of the toll would be possessed of a franchise exactly similar to that of the owner of a ferry, and would be liable to be indicted if he did not keep the bridge in repair; but would he be entitled to compensation on account of traffic having been diverted from his bridge by a new railway? It is difficult to suppose that he would, for his right to receive toll in respect of all persons and goods passing over his bridge has not been violated in the least. On the whole, we are of opinion that no action could have been maintained by the plaintiffs in respect of the railway bridge if it had been opened without the authority of an Act of Parliament.

We have next to consider whether the plaintiffs would have had a good cause of action in respect of the foot-bridge. Now the case finds that the company had charged no toll in respect of the foot-bridge, and only used it to enable passengers to get to and from their station, and assuming that an action might, under some circumstances, be maintained by an owner of a ferry for the disturbance of his ferry by the opening of a bridge, and that the indirect profit obtained by the company from the use of the bridge has the same effect as the charging of a toll, still we think that the case of *Newton* v. *Cubitt* (1) is an authority that no action could have been maintained by the plaintiffs in respect of the foot-bridge. The foot-bridge was made expressly to provide for a new traffic in which the defendants had an interest, and was rendered necessary by a change of circumstances, and it seems to us that we should be overruling *Newton* v. *Cubitt* (1), if we held that the defendants were obliged to compel all persons who wished

(1) 12 C. B. (N.S.) 32; 31 L. J. (C.P.) 246.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

to cross the river to or from the defendants' station to go round by the plaintiffs' ferry. The case, indeed, finds that some persons who were not going to the station used the foot-bridge to cross the river. We do not see how the defendants can be liable for the acts of trespassers, and if they were liable for the acts of trespassers, they would be liable to an action for not having prevented those persons from crossing the bridge, and not liable on account of their acts to pay compensation to be assessed under the Lands Clauses Consolidation Act. For these reasons, we are of opinion that the plaintiffs could not have maintained any action against the defendants, either in respect of the railway bridge or in respect of the foot-bridge, if they had been erected without the authority of an Act of Parliament, and that consequently they are not entitled to maintain this action.

Having come to this conclusion, it is, strictly speaking, unnecessary for us to give any opinion on the second point; but as the second point is the one on which the judgment of the Court below, both in the present case and in that of *Reg.* v. *Cambrian Ry. Co.* (1), mainly proceeded, we have thought it right to consider it and give our opinion upon it. For that purpose we must consider what was the rule of law established by the case of *Brand* v. *Hammersmith Ry. Co.* (2), and determine whether the present case comes within the rule. Now, what was decided in *Brand* v. *Hammersmith Ry. Co.* (2) was that the owner and occupier of a house was not entitled to recover compensation from a railway company, in respect of the nuisance and actual structural damage to his house caused by vibration arising from the running of trains after the line was opened; and the ground of the decision appears to us to have been that a railway company is not bound to pay compensation for damage necessarily caused by the running of their trains in the way authorized by their Act of Parliament after the line is opened to the public. The two learned lords who formed the majority of the House of Lords on that occasion carefully examined the different sections of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act bearing on the subject, and from that examination came to the conclusion that compensation is only given for damage caused by the construction

(1) Law Rep. 6 Q. B. 422. (2) Law Rep. 4 H. L. 171.

of the railway and works, and is not given for damage caused by the user of the railway after it has been constructed and opened to the public. Now, that being the rule so established, we are of opinion that the present case comes within the rule. It seems clear to us that the damage for which compensation is claimed in the present case has arisen solely from the user of the railway and works after they had been constructed and opened to the public, and has not arisen from the construction of the railway and works. In the case of *Reg.* v. *Cambrian Ry. Co.* (1) the judges rely on the clause in the Lands Clauses Consolidation Act by which the word "land" includes "franchises." This, no doubt, proves that if franchises are injured by the construction of the railway or works—which they may be—compensation may be obtained, but surely does not prove that compensation ought to be given for damage caused to a franchise by the user of a railway after it has been constructed, contrary to the rule in other cases. The Court also relied upon this, that in *Brand* v. *Hammersmith Ry. Co.* (2) the company had no intention to cause damage to Mr. Brand's house, though damage was occasioned by their acts, but that in *Reg.* v. *Cambrian Ry. Co.* (1) it was the object of the company to divert the traffic from the plaintiff's ferry. We cannot see why this should make any difference. It is impossible to deny that structural damage to a house was the proper subject of compensation, if the damage was caused by the construction of the railway; but compensation is not given because the damage is caused by the user of the railway, and not by its construction. If that be good law, why is there not to be some rule respecting franchises? If damage is caused to a franchise by the construction of a railway, as, for instance, if the approach to a ferry is blocked up by a railway embankment, compensation would be given, but we can see no reason why the owner of a franchise should have a greater right to compensation for damage caused by the user of a railway, as distinguished from its construction, than any one else. Then Mr. Justice Blackburn expresses an opinion that the construction of the railway may be treated as the proximate cause of the damage to the owner of the ferry, because the railway was constructed for the purpose of diverting the traffic

(1) Law Rep. 6 Q. B. 422. (2) Law Rep. 4 H. L. 171.

1877

HOPKINS v. GREAT NORTHERN RAILWAY CO.

from the ferry. It seems to us that the construction of the railway, as distinguished from the user of the railway after it was constructed, was not the proximate cause of the damage suffered by the owner of the ferry, for this simple reason, that if the railway and foot-bridge had only been constructed and never opened to the public or used, it is plain the owner of the ferry would have suffered no damage whatever. We are therefore of opinion that, in accordance with the judgment of the House of Lords in the case of *Brand* v. *Hammersmith Ry. Co.* (1), the appellants are entitled to succeed.

The judgment for the plaintiffs must be reversed, and judgment entered for the defendants, with costs both in the Court below and here.

Judgment reversed, and entered for the defendants.

Solicitor for plaintiffs: *G. F. Smith.*

Solicitors for defendants: *Johnston, Farquhar, & Co.*

Dec. 1.

[IN THE COURT OF APPEAL.]

SANGUINETTI *v.* THE PACIFIC STEAM NAVIGATION COMPANY.

Ship—Charterparty, Construction of—Cesser of Charterer's Liability—Waiver of Lien on Cargo at Request of Charterer's Agent—Charterer Consignee of Cargo—Demurrage—Damages for Detention—Stiffening Coal.

1 C&D 249

Statement of claim, that defendants chartered plaintiff's ship for a voyage from Cardiff to Callao with a cargo of coals, to be consigned to defendants' agent at Callao. By the charterparty the ship was to be loaded at the rate of 75 tons per day, commencing when she was wholly unballasted; stiffening coal to be supplied at the ship's expense at the rate of 40 tons per working day, all days on which stiffening coal was taken on board or the ship was detained for the same, to be excluded from the working days allowed for loading; the vessel to be discharged at the rate of 40 tons per day; demurrage to be paid for each day beyond the said days allowed for loading and discharging at the rate of 3*d.* per registered ton per day; the master to have a lien on the cargo for all freight and demurrage; all liability of the charterers to cease as soon as the cargo was on

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(1) Law Rep. 4 H. L. 171.

board; and all questions, whether of short delivery, demurrage, or otherwise, to be settled with charterer's agent at the port of destination (which settlement to be binding on the owners); the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage.

That the ship was detained by the default of the defendants in providing stiffening coal; that the cargo was ultimately loaded; that plaintiff requested the defendants' agent at Callao to settle the claims as to demurrage, &c., of the plaintiff, which he refused to do; but the defendants' agent required the plaintiff to deliver the cargo, which the plaintiff accordingly did, without enforcing his lien for demurrage. Plaintiff claimed 350*l.* from the defendants for demurrage or damages for detention.

The defendants demurred to so much of the claim as alleged liability under the charterparty, on the ground that the liability of the defendants had ceased on the loading of the cargo:—

Held, 1. That the demurrage clause applied to the loading of the stiffening coal as well as to the loading of cargo proper. But, 2. Even if it did not, the lien for "demurrage" would extend to damages for detention by not loading stiffening coal, as well as to demurrage proper. And therefore, 3. That the cesser of liability clause applied to liability in respect of both. 4. That the fact that defendants were themselves consignees as well as charterers made no difference in the construction of the cesser of liability clause. 5. That the rest of the clause, giving the defendants' agent power to settle claims for short delivery and demurrage, made no difference in the construction as to cesser of liability. 6. That the facts, that the defendant's agent refused to settle the demurrage, and that the plaintiff had delivered the cargo at the request of the defendants' agent without enforcing the lien, did not revive the defendants' liability under, or give rise to an action on, the charterparty.

STATEMENT of claim, that, on the 28th of December, 1874, a charterparty of the ship *Guiseppe* was entered into between the plaintiff, who was owner, and the defendants, for a voyage from Cardiff to Callao. The charter was set out, and the following are material parts:—The ship to proceed to Cardiff and there load, in any dock ordered by shippers, a full cargo of steam coal from the colliery named by the charterers' agent on the vessel's arrival at Cardiff, and being so loaded, to proceed to Callao and there deliver the same, as ordered by charterers' agents (the act of God, fire, and all accidents of seas, &c., excepted), freight to become due on the right delivery of the cargo, and to be paid at the rate of 24*s.* per ton of 28 cwts., one-half by charterers' acceptance at four months from sailing of the ship, or in cash under discount, and the balance on unloading and right delivery of cargo.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

"The ship to be loaded at the average rate of 75 tons per clear working day (as tendered, during night and day), commencing when the vessel is in berth (under the tip where tips are used) wholly unballasted, and ready to receive cargo, notice of which is to be given in writing by the master to charterers' agent."

Then followed a clause excepting from the calculation of working days the time lost by strikes or other causes beyond the control of the charterers.

"Stiffening coal, if required, to be supplied at the ship's expense, and at the rate of 40 tons per clear working day after written notice is given to the charterers' agents of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, are to be excluded in the computation of the said working days allowed for loading.

"The vessel to be discharged at the average rate of 40 tons per clear working day, after written notice is given to the charterers' agent of readiness to deliver. Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively, at the rate of 3*d.* per registered ton per day.

"The master to have a lien on the cargo for all freight and demurrage due under this agreement.

"All liability of the charterers under this agreement shall cease as soon as the cargo is on board (except as to the aforesaid payment to be made on sailing), and all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination (which settlement is to be binding on the owners); the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage."

The claim then alleged that the ship proceeded to Cardiff, and was ready to receive stiffening coal on the 24th of February, 1875, of which notice was given to the defendants.

The whole of the ballast could not be taken out of the vessel until the necessary stiffening coal should have been provided, and the usage was to discharge the greater portion of the ballast, and to retain a small quantity of ballast which is kept in the vessel

for the purpose of keeping her upright, and this latter small quantity of ballast is discharged simultaneously with the receipt of the stiffening coal.

The defendants did not supply the stiffening coal according to the notice until the 14th of April, 1875, and the ship was thereby prevented from being wholly unballasted within the true intent and meaning of the charterparty until the 14th of April, 1875, and the plaintiff was also thereby prevented from giving such notice of the vessel being ready to receive cargo.

Although no time was lost by reason of any of the excepted causes or perils, &c., the defendants did not load the ship at the rate in the charterparty mentioned, and the defendants occupied and consumed forty-eight days over and above the time which it would have taken to load the ship at the rate aforesaid.

The defendants detained the ship forty-eight days over and above the period so agreed upon for loading as aforesaid, and thereby became liable to pay to the plaintiff 350*l.* 13*s.*, for demurrage of the vessel, or for damages for the detention of the vessel.

The defendants ultimately loaded the agreed cargo on board the ship, and the plaintiff carried the same in the ship to Callao for the defendants, and there required the manager or agent of the defendants at the said port of destination to settle the several questions aforesaid, and to pay to the plaintiff the damages to which the plaintiff was entitled by reason of the several breaches of contract, and the said demurrage. But the agent refused to settle the questions, or to pay the damages or demurrage.

The defendants, by their manager or agent, in that behalf required and requested the plaintiff to deliver the said cargo, and he then delivered the same to the defendants without enforcing his said lien for demurrage, and the defendants then took delivery thereof accordingly.

Demurrer to so much of the statement of claim as alleges liability in respect of what took place in England, on the ground that it appears that the cargo was on board, and all liability of the defendants was by the charterparty to cease thereupon; and also on the ground that it does not appear that the said questions had been settled with the said manager or agents of the defendants.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

1876. May 24. *Benjamin, Q.C.* (*Wood Hill*, with him), for the plaintiff.

Cohen, Q.C. (*Crompton*, with him), for the defendants, cited *Kish* v. *Cory* (1), *Bannister* v. *Breslauer.* (2)

MELLOR, J. It is stated in the claim that the defendants by their manager or agent required the "plaintiff to deliver the cargo, and he delivered the same to the defendants without enforcing his lien for demurrage, and they then took delivery thereof accordingly." There was no fresh bargain, and I confess myself bound by the authority of the cases cited by Mr. Cohen, that the meaning of the contract was that all liability of the defendants on the contract should cease.

QUAIN, J. We must give a full meaning to the cesser clause, and that cesser clause, in words similar to these, has been construed hitherto to get rid of all liability for detention or for demurrage at the port of loading in England. Looking at the statement of claim, it seems to me clear that, as to the forty-eight days, an action for demurrage or detention is got rid of by the cesser clause. I should be disposed to act upon the judgment of Brett, J., in *Kish* v. *Cory* (3), and to hold that the detention of a ship under these circumstances must be treated as demurrage and be within the lien clause. Then with regard to the demurrer, Mr. Benjamin argued, as I understand, that the personal liability of the defendants is disposed of, and a lien given; but that, if after that the defendants ask him to waive his lien, and to give up the goods, that revives the personal liability. I do not think that argument can be sustained. The giving up the personal responsibility remains still in the contract, and the only thing the shipowner could do was to enforce his lien or make a fresh bargain on the waiver of it. There must be judgment for the defendants.

From this judgment the plaintiff appealed.

Dec. 1. When the appeal came on to be heard some discussion arose as to the form of the demurrer, and of the pleadings

(1) Law Rep. 10 Q. B. 553, and per Brett, J., at p. 560.

(2) Law Rep. 2 C. P. 497.

(3) Law Rep. 10 Q. B. at p. 560.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

generally. It was admitted that the conduct of the charterers' agent at Callao, as alleged, might disclose a fresh cause of action independent of the liability arising out of the charterparty, which would have to be tried hereafter, and that this cause of action was not covered by the demurrer; but it was agreed that the alleged refusal of the agent to settle the questions of demurrage at Callao, and the delivery of the cargo to him at his request without enforcing the shipowner's lien, so far as they affected the liability of the defendants under the charterparty, should be considered as included in the demurrer, although they did not "take place in England."

Benjamin, Q.C. (*A. Russell* with him), for the plaintiff. On the true construction of this charterparty the present claim is not included in the lien clause, and consequently not included in the cesser of liability clause. The lien clause only mentions "demurrage;" this claim, although called a claim for demurrage, is a claim for damages for detention. Demurrage is a technical term which only applies when there is a specific number of lay days allowed, and then a specific number of days allowed for demurrage at a certain rate. In this charterparty there is no such stipulation. At any rate, demurrage is only applicable to delay in loading the cargo; but here the delay was in unballasting the ship, and putting in the stiffening coal, which was no part of the cargo. The charterer, therefore, was not intended to be relieved from liability in respect of this detention: *Kish* v. *Cory* (1); *Lockhart* v. *Falk* (2); *Francesco* v. *Massey*. (3) But supposing the present claim for detention is included in the lien clause, the defence set up by the grounds of demurrer is unreasonable and unprecedented. This case differs from all others reported on this subject, inasmuch as in all other cases the charterer and the consignee of the goods were different persons. The general custom is for the merchant abroad to employ a correspondent in England to charter the ship and consign the goods to him. The charterer has no interest in the matter after the ship has sailed. But here the charterers and the consignees are the same persons, and they stipulate that instead

(1) Law Rep. 10 Q. B. 553. (2) 10 Ex. 132.
(3) Law Rep. 8 Ex. 101.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

of paying the freight, and demurrage, and other charges in England, their agent, who will receive the goods, shall settle them at Callao. The word "settle" must include payment. The agent was to pay the freight and other charges and receive the cargo. The claim for cesser of liability was conditional on his doing this. He refuses to settle, and induces the captain to deliver the cargo to him. Surely, it cannot be said that the liability of the charterers, who are also the owners of the cargo, is thereby released. The lien on the cargo was only a collateral security, and the plaintiff can give that up without giving up his right to the debt.

Cohen, Q.C. (*A. Williams* with him), for the defendants. It may turn out on the evidence that the agent at Callao had authority to bind the defendants by a fresh promise to pay, and that he did make such promise; but that is a fresh cause of action which is not covered by this demurrer. This demurrer only extends to all claims under the charterparty. With respect to the word "demurrage," it has been decided that where special days for demurrage are not mentioned in a charterparty, the lien for demurrage includes all detention in port, whether at the port of loading or at the port of discharge: *Bannister* v. *Breslauer* (1); *Francesco* v. *Massey* (2); *Kish* v. *Corry*. (3) There is no distinction between coal for stiffening and coal for the ordinary cargo; whenever the days for loading end, the days for demurrage begin; this claim for detention is therefore included in the lien clause, and consequently in the cesser of liability clause. That clause is not conditional, but absolute.

[BRETT, J., referred to *French* v. *Gerber*. (4)]

There is no distinction made in the reported cases between cases where the charterer and consignee are the same person and where they are different; nor is there any distinction in reason. In either case the shipowner gives up all his right of action against the charterer in exchange for his lien on the cargo, and if he waives the lien, the right of action will not revive. The word "settled" does not include payment. It was necessary to give the agent the power of settling disputed charges on both sides;

(1) Law Rep. 2 C. P. 497.
(2) Law Rep. 8 Ex. 101.
(3) Law Rep. 10 Q. B. 553.
(4) 1 C. P. D. 737; since affirmed by the Court of Appeal, Feb. 6, 1877. 2 C. P. D.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

but the shipowner looked only to the cargo for payment; and the agent would deduct the short delivery from the freight.

A. Russell, in reply, referred to *Gray* v. *Carr*. (1)

MELLISH, L.J. The question in this case depends upon whether, according to the true construction of this charterparty, the defendants were liable to pay either demurrage or damages for detention in respect of the ship having been detained for a greater length of time than at the rate of forty tons a day for loading what was called stiffening coal, and the demurrer in terms appears really to raise the question whether they were liable in respect of a cause of action which arose immediately on the detention having accrued in England. We thought, in order to settle the question fully between the parties, it was desirable also to consider the question whether any cause of action on the charterparty would arise in respect of that demurrage, or damages for detention, in the event of the charterers' agent not settling for it when the ship arrived at Callao. The clause respecting demurrage, which I will refer to first, is this: "Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively, at the rate of 3*d*. per registered ton per day." Now the first question I will consider is, whether the word "loading" in that clause is confined to the loading of the ship, at the rate of seventy-five tons per day, after the stiffening coal has been put in and all the ballast taken out, or whether it includes the putting the stiffening coal on board, so that if the ship is detained in respect of furnishing the stiffening coal a greater time than would be occupied at the rate of forty tons per day, there is an agreement to pay damages at the rate of 3*d*. per registered ton per day in respect of that demurrage. The charter says: "The ship is to be loaded at the average rate of seventy-five tons per clear working day, commencing when the vessel is in berth under tip, wholly unballasted, and ready to receive cargo, notice of which is to be given in writing by the master to charterers' agent." Now, I agree that that time does not begin until after the stiffening coal has been put on board, because the ballast is not to be entirely taken out until the stiffening coal has been put on board. Then there is the clause: "Any time lost by reason of

(1) Law Rep. 6 Q. B. 522.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

riots, strikes, &c., to be excluded in the computation of the said working days." Then it says: "Stiffening coal, if required, to be supplied at ship's expense, and at the rate of forty tons per clear working day after written notice is given to the charterers' agent of its being required; but all days on which stiffening coal is taken on board, or the ship is detained for the same, are to be excluded in the computation of the said working days allowed for loading." Thus it appears that the days occupied in putting on board the stiffening coal are not to count in the loading days, which loading is to be done at the rate of seventy-five tons per day. But if you look at the substance of what the parties meant, it is plain enough that they meant, if stiffening coal was required it was to be loaded at the rate of forty tons per day, and after that, when the ballast has been taken out, the cargo was to be loaded at the rate of seventy-five tons a day. In my opinion, they are separated because one is to be at the one rate of forty tons per day, and the other is to be at the other rate, namely, of seventy-five tons per day.

Then, after giving the rate at which the vessel is to be discharged, it says: "Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively;" and if the stiffening coal is part of the loading, then each day during which the forty tons is to be put in is one of the days; and when we look at the sense of it, why is not the shipowner to receive his 3*d.* per registered ton per day just as much if there is delay in the days allowed for loading the stiffening coal? If he cannot go on, or does not choose to go on, without stiffening coal, why is he not to receive his 3*d.* per registered ton per day just as much for that as in respect of any delay that may occur in the seventy-five tons per day? To suppose the contrary is absurd. It may be added that here there is no number of lay days mentioned in the charter; it does not say ten, or fourteen, or any particular number of days for loading, but whatever time is occupied beyond the rate of forty tons per day while loading stiffening coal, and beyond the rate of seventy-five tons per day while loading the rest of the cargo, is to be paid for, however long or short. I can see no reason why that should not apply to any delay or detention in loading the stiffening coal, as well as to detention in loading the other, though, after all, it makes no difference, in my opinion,

even if the construction were otherwise, because the next clause is, "The master to have a lien on the cargo for all freight and demurrage due under this agreement." The real question we have to decide is, what is the meaning of "demurrage" under that clause? In my opinion, when we look at the whole charter, that must have meant to include damage by the detention during the loading of the stiffening coal, as well as during the loading of the other cargo. It would be a very awkward construction to make the word "demurrage" mean two things in these two clauses which come directly one after the other, and as a means of avoiding that, the proper construction is to say that the demurrage in both of them extends to the detention beyond the supposed time while the stiffening coal is being loaded, as well as to the supposed time for loading the rest of the cargo.

That being so, then, we come to the clause which discharges the charterer from liability. "All liability of the charterers under this agreement shall cease as soon as the cargo is on board, except as to the aforesaid payment, to be made on sailing." Stopping there, those are the words on which a construction has been put in numerous cases, and it is quite clear that, according to the authorities, they cannot be confined to a liability arising from breaches subsequently to the loading, but they include all liability under the charter of every description. That is the primâ facie meaning, and therefore they include all liability, and, in my opinion, include the liability in respect of the demurrage for detaining the ship after the stiffening coal had been put on board, as well as damages for detaining the ship during the loading of the stiffening coal. Then it goes on, "And all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination, which settlement is to be binding on the owners, the owners and the master to have a lien on the cargo for all freight, dead freight, and demurrage."

Now, what is the meaning of the word "settle?" Does it mean to revive the liability which has been taken away in terms by the previous clause, which says, "All liability under this agreement shall cease?" In the first place, if it did, it would make the two clauses contradict one another; it would revive and continue, in

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

fact, that which would not have been begun, because the construction practically would be that a liability was not to arise until the charterers' agent had refused to settle. In my opinion, the word "settle" does not import that there is a contract on the part of the defendants to pay by means of their agent. I think the contrary is shewn from the clause immediately following, that the plaintiff is to have a lien for all freight, and dead freight, and demurrage; and in my opinion, notwithstanding the consignors and consignees are the same persons, and notwithstanding the cargo is to be delivered to the defendants themselves through their agents, still the clause does mean that the plaintiff is to bring no action at law at all, after the ship is fully loaded, against the charterers on the charter, that he is to have as a remedy for his freight, dead freight and demurrage, nothing but a lien on the cargo. The clause says that all claims for short delivery are to be settled in the same manner. A claim for short delivery is in fact a cross-claim, it is a claim by the charterers against the shipowner in respect of the shipowner not delivering the full quantity of cargo which is loaded on board, and I think it means that this is to be settled by the charterers' agent at Callao; he is to settle it, as I understand, by deducting it from the freight before the cargo is delivered. This seems to me to be the plain and natural meaning of the words which the parties have used, having regard to the construction put on clauses of this kind by a great variety of cases, and I do not think these words about the settlement or the fact that the coals were delivered to the charterers' agent, furnish any reason why we should put a different construction on them. There may have been reasons why the defendants wished to make the shipowner compel their agent, who, I suppose, had been receiving a large quantity of money for them, to settle with him, so that they might not have the trouble of doing it themselves. Therefore it seems to me that the true meaning of this contract is that there was to be no liability on the charterers at all after the loading of the cargo.

Now in the statement of claim it is alleged that the defendants themselves, by their agent or manager, requested that the cargo might be delivered to them without enforcing the lien. If that is true, that may possibly give rise to a right on the part of the

plaintiff wholly independent of the charter, but it would be a contract dehors the charter. Mr. Benjamin said he did not claim on the present occasion, or wish for any decision about, any right he might have independently of the charter, therefore we give no opinion, one way or the other, in respect of any claim that there may be against the defendants on account of their agent or manager having requested that the cargo should be delivered without the lien for demurrage having been enforced.

In my opinion, according to the true construction of the charter itself, the defendants were free from all liability on the ship sailing after it was fully loaded. In my opinion the liability did not revive merely because no settlement was come to with the charterers' agent, and the shipowner ought to have enforced his lien. On those grounds I am of opinion that the judgment of the Queen's Bench Division ought to be affirmed.

BRETT, J.A. In my opinion this demurrer is confined to any right of action arising on the charterparty, and if the statement of claim does, upon proof by evidence, enable the plaintiff to sustain any action against the defendants which is not an action in right of the charterparty itself, this demurrer is not pointed to any such right. Therefore if the plaintiff can sustain any right of action within the allegations of this statement of claim against the defendants by reason of anything which their agents did, under their authority, that is still open to him; and the only question we have to determine, and the only question which the Queen's Bench Division determined, was, whether there was a right of action on the charterparty.

Now with regard to that, I have come to the conclusion that there is no action at all by the plaintiff against the defendants on this charterparty.

In the first place, I agree that the claim here is within the demurrage clause; and I think that is so, whether the stiffening coal is in some sense to be considered as part of the cargo, or whether it is not. Mr. Benjamin admitted that it was part of the cargo; but I am not sure after all that it is so, because I observe that the stiffening coal is to be supplied at the ship's expense. However that may be, the way the matter strikes me is this: Where a ship is

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

chartered to carry goods on a voyage, the time of the occupation of that ship depends partly upon the conduct of the charterer and partly upon the conduct of the shipowner; the length of time occupied by the ship on the voyage mainly depends upon the accident of the wind and weather, but partly upon the conduct of the shipowner; the time occupied before the voyage certainly depends in some measure upon the conduct of the charterer, because the charterer is always to supply a cargo to be loaded. So at the other end of the voyage, the time during which the ship is or may be occupied will depend upon whether the charterer, or his consignee, is there ready to receive the cargo. Now as to the time of the occupation of the ship at the beginning and the end of the voyage, that part of it which depends on the conduct of the charterer or consignee is generally provided for by what used to be called the lay days. The lay days are those days during which, though the ship is detained by the conduct of the charterer or consignee, the shipowner is not allowed to make any claim in respect of the occupation of his ship, beyond the freight. Therefore in every charterparty you require a number of lay days to be fixed—lay days at the commencement of the voyage and lay days at the termination of the voyage.

Now, there are two ways of fixing the number of these lay days, one is to estimate the number of days which will be fairly required, and to state those in the charterparty, as, for instance, that for the loading and unloading of the ship twenty-eight lay days shall be allowed. But another mode is that which was followed in this case, which is by the use of certain phraseology which will become applicable according to circumstances, so as to arrive at the number of lay days that are to be allowed for the loading of the coals; and in this case the lay days at the commencement of the voyage, which may depend upon the conduct of the charterer, will be regulated by the quantity of coal which he will provide for the loading of the ship day by day, and which he is bound to provide, although at the expense of the ship so far as the stiffening of the ship is concerned. The number of days which the ship may be occupied at the port of loading will therefore depend on the conduct of the charterer. Instead of naming the days, the capacity of the ship not being, perhaps, exactly known, certainly the

quantity of stiffening she would require not being known, the number of lay days are here fixed by a phraseology which will become applicable according to circumstances, and will be ascertained as soon as the ship arrives and before the loading begins. If, when the ship arrives at the port of loading it is found she is a ship that will carry a certain number of tons of coal, the first thing to be done is to divide the quantity of coal she will carry by seventy-five, that will give you a certain number of lay days; then you must take the quantity of coal which will be required for stiffening and divide that by forty. That will give another number of lay days. Add those two numbers of lay days together and you will get the number of lay days allowed for this ship at the port of loading, and the construction of the charterparty is the same as though that number of days had been originally written in the charterparty as the number of lay days. Then that being so, the charterparty goes on to say if the ship is detained,—of course it being always understood by the default of the charterer,—beyond those days, for however long she may be detained beyond the lay days, demurrage is to be payable. Therefore, it seems to me, that consideration shews that all the days of detention beyond those lay days allowed at the port of loading are to be paid for by demurrage; and that would bring the whole case within the demurrage clause.

The question of whether payment or compensation to be made for days over the lay days is to be considered as demurrage, or whether it is to be considered as detention, generally depends upon this, whether there is a fixed number of demurrage days mentioned in the charterparty, because if there is a fixed number of demurrage days beyond lay days, and the ship is delayed by the fault of the charterer, then the detention beyond that is what is called a detention, to be compensated for by damages; but here the number of demurrage days is not mentioned at all, and, therefore, all the detention beyond the lay days seems to me to be demurrage, and quite within the demurrage clause. Therefore, whether the stiffening coal be part of the cargo or not, all the days beyond the aggregate number of days to be allowed the charterer for loading the ship and for supplying stiffening coal, if required, are demurrage days, and are within the demurrage clause.

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

But if they were not, and if the demurrage clause were to be confined to a certain number of days, I should entirely agree that in the clause which gives a lien demurrage is to be enlarged, and will not only include demurrage days proper, but also days of detention where a claim is to be made in the nature of demurrage.

I therefore come to the conclusion that in this charterparty there is a lien for the detention of the ship at the port of loading. There was, therefore, a right of lien in the hands of the captain upon this cargo in respect of the claim for which this statement of claim is framed, that is, for detention. If that be so, whether the decision in the late case of *French* v. *Gerber* (1) is adopted or not, about which, therefore, we need not give an opinion, the absolving clause here, unless it is to be distinguished from the absolving clause in other charterparties in former cases, will clearly, according to the authorities, absolve the defendants from any claim in respect of any detention at the port of loading, and that will reduce the question in this case to be, whether the latter part of the clause does modify the former part so as to make it different from the other cases.

For a moment I was struck certainly with the observation or suggestion that here there were questions of short delivery which were to be dealt with at the port of discharge, and certainly for short delivery, in whatever sense you take it, there can be no lien on the part of the shipowner; but when you come to look at this it seems to me that the short delivery here spoken of would be a claim by the charterer against the shipowner, as Mr. Cohen has contended. But supposing there is a short delivery, the charterer not only in general affirms that he is not bound to pay freight in respect of that which is not delivered, but that he is also entitled to make a claim upon the captain for not having delivered a full and complete cargo; and I entirely agree, as far as I know, that although it is not the case in strict law, yet in ordinary practice that matter is usually settled at the time of the delivery of the cargo, and upon the terms that freight shall be paid in respect of the quantity that is short, but that the value of it shall be deducted from the whole freight which is payable in respect of the full delivery. It appears to me, therefore, that this question of

(1) 1 C. P. D. 737; since affirmed by the Court of Appeal, 2 C. P. D.

short delivery is one which is to be determined by the agent at Callao, and is a stipulation in favour of the charterers.

There is another question which the agent of the charterers at Callao may be the person most qualified to determine, and that is the question of demurrage at the port of discharge. If there is any dispute about the extent of that demurrage, the number of days which the captain may be kept or not, that is a thing that may be well settled by the charterers' agent there. In this charterparty he is given power to settle both those questions against the shipowner. If, therefore, there was such a dispute as this, whether the captain was to be entitled to claim ten or fifteen days demurrage at the port of discharge, the agent might determine on only ten, nevertheless the captain might insist on fifteen days, and might refuse to deliver the cargo unless he were paid for fifteen. In such a case the defendants say the decision of the agent is to be binding on the shipowner, and if the captain did detain the cargo for such a reason, the shipowner would be liable for that act of the captain. If the charterers paid the fifteen days' demurrage in order to get delivery, then the five days would have to be paid back, because the decision of the agent would be binding on the shipowner. This clause, therefore, was probably drawn with reference to the demurrage at the port of discharge, but then, by reason of the generality of the words of it, we must not confine it to that, and it is applicable to ordinary demurrage at the port of loading. If there were a dispute between the captain and the charterers as to the number of days upon which demurrage was due at the port of loading, information being given to the agent abroad, I apprehend under this clause he might settle that too. But all these are settlements of questions which may be come to before the captain is to give up his lien at all, and it is not inconsistent with them that the ordinary meaning should be given to the other part of the clause, namely, that all liability of the charterers should cease, and that the shipowner has made up his mind, consistently with all the cases that have been decided, to rely upon his lien alone as his remedy.

This construction seems to me to give effect to all parts of the clause, and I am, therefore, of opinion that the Queen's Bench Division is right. But it is expressly to be understood that in

1877

SANGUINETTI v. PACIFIC STEAM NAVIGATION CO.

so deciding we do not in the least determine whether or not, upon circumstances which arose at Callao, the plaintiff has a right of action, either against the present defendants or against the defendants' agent at Callao, independently of the charterparty.

AMPHLETT, J.A. I am of the same opinion. Treating the demurrer as confined to the cause of action under the charterparty, I do not propose to repeat the reasons which have been clearly given by the Lord Justice and my Brother Brett. I only say I entirely adopt those reasons, and I agree that the decision of the Court below should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Ingledew, Ince, & Greening, for Ingledew, Ince, & Vachell, Cardiff.*

Solicitors for defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

Feb. 57.

EVERSHED *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company — Undue Preference — Gratuitous Carting — Loading and unloading of Customer's Goods, in order to prevent Traffic from passing over other Railway — Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 90—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2.

The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's premises were not connected with the M. Railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway, and to divert some portion of it to their own line, the defendants carted goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart goods gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before-mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:—

Held, that the gratuitous carting, loading, and unloading of the goods for the

three firms was an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same.

Affirmed on appeal (3 Q.B.D. 135; 3 App. Cas. 1025; 47 L.J. Q.B. 2).

ACTION to recover the sum of 1356*l.* 8*s.* 7*d.*, in respect of alleged overcharges by the defendants as carriers of goods by railway for hire. By the consent of the parties, and by a judge's order, a case, of which the following are the material facts, was stated by an arbitrator for the opinion of the Court:—

1. The plaintiff is a brewer, carrying on business at Burton-on-Trent.

2. There are three railway companies, who have stations in and carry goods to and from Burton, the defendants, the Midland Railway Company, and the North Staffordshire Railway Company.

3. The premises of the plaintiff are not connected by sidings with the stations or lines of railway of either of the three companies.

4. In the case of those brewers whose premises are not connected with either station or railway, the three railway companies charge what is called a station-to-station rate, which includes, in the case of goods carried from Burton, the service of unloading them from the carts at the goods station at Burton, the service of loading them on railway trucks, and providing the necessary station accommodation, and the service of carrying them to the station of destination, and in the case of goods carried to Burton the service of conveying the goods from the station at which they are received to the goods station at Burton, the necessary station accommodation at Burton, and the services of unloading them from the railway trucks on to the railway companies' wharves, and of sorting and loading them on carts for delivery in Burton. The brewers themselves, in many instances, convey the goods between their premises and the goods stations of the three railway companies. The railway companies are also ready to perform this cartage; and when they do perform it, they make, except as hereinafter stated, an additional charge to the brewers beyond the station-to-station rate of 1*s.* per ton for such service. Such charge of 1*s.* is a fair equivalent for the service so performed.

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

5. In the case of those brewers whose premises are connected by sidings with either station or railway, the companies make a difference. Before the goods trains arriving at Burton enter the goods station, they are placed on sidings belonging to the railway company, where the trucks containing goods for the brewers whose premises are so connected are separated from the trucks containing goods for the brewers whose premises are not so connected. The former trucks do not enter the goods station at all, but are taken along other sidings near or into the premises of the brewers for whom they are intended. Some brewers have locomotive engines of their own, and in that case the railway company leave the trucks on the railway company's siding communicating with the brewers' premises, and the brewers themselves haul the trucks into their own premises. Other brewers have no locomotive engines, and in that case the railway company haul the trucks into the brewers' premises with their (the railway company's) engines. In the case of outward traffic, the brewers who have locomotive engines haul the trucks out of their own premises on to the railway sidings, whence they are hauled by the railway company to the sidings outside the goods station, where they are made up into trains for their respective destinations without entering the goods station at all. In the case of brewers who have no locomotive engines the railway company haul the trucks out of the brewers' premises. In both cases the brewers themselves load and unload the goods at their own cost, and if they desire to shift the trucks in their own premises, after they have been hauled in, and before they are ready to be hauled out again, they do so, at their own cost, with locomotive engines, if they have them, or with horses.

6. The railway company are thus saved the cost of loading and unloading the goods, the cost of the necessary station accommodation in the goods station, and, in the case of the brewers who have locomotives, the cost of hauling the trucks into or out of the brewers' premises. The railway companies have always allowed a rebate or deduction from the station-to-station rate in respect of the services thus dispensed with, and in 1866 they agreed that the rebate or deduction allowed to brewers having sidings on their premises should be 9*d.* per ton. This rebate or deduction, and the grounds on which it was made, were well known at the time to the

plaintiff and the other brewers in Burton, and has continued to be made from 1866 down to the present time.

7. In the case of the defendants, the rebate or deduction of 9*d.* per ton fairly represents what it would cost them to perform the service of loading and unloading, and for the necessary station accommodation.

8. The defendants have always carried for the plaintiff in the manner and on the terms set out in paragraph 4. The plaintiff has sometimes carted his traffic between his premises and the defendants' goods station, and sometimes the defendants have done such cartage for him. Whenever the defendants have done such cartage for the plaintiff they have always charged him 1*s.* per ton for such service, and they have never made him any rebate or deduction from the station-to-station rate.

9. Amongst other brewers carrying on business at Burton there are three firms: Messrs. Truman, Hanbury, Buxton, & Co., Messrs. Ind, Coope, & Co., and Messrs. Cooper & Co. The brewery and premises of Messrs. Truman, Hanbury, Buxton, & Co. have been, during all the period to which this action relates, connected with the goods station of the Midland Railway Company by sidings.

10. Messrs. Ind, Coope, & Co. have three sets of premises in Burton, which have been, during all the period to which this action relates, connected with the goods station and main line of the Midland Railway Company by sidings.

11. Messrs. Cooper & Co.'s premises, since the year 1872, have been connected with the goods station and main line of the Midland Railway Company by sidings.

12. The Midland Railway Company have, as to Messrs. Truman, Hanbury, Buxton, & Co., and Messrs. Ind, Coope, & Co., during all the period to which this action relates, and as to Messrs. Cooper & Co. since the year 1872, carried goods to and from their respective premises in the manner and on the terms set out in paragraphs 5 and 6 of this case. Messrs. Ind, Coope, & Co. have locomotive engines at their premises on the south of the Midland Company's main line, but not at their premises on the north. The other two firms have no locomotive engines.

13. The defendants have running powers over the main line of the Midland Railway Company and the sidings south thereof, and

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

by this means have access by railway to the premises of Messrs. Ind, Coope, & Co. on the south of the main line of the Midland Railway Company. The defendants have no running powers over the sidings on the north of the main line leading to the premises of Messrs. Ind, Coope, & Co., and Messrs. Truman, Hanbury, Buxton, & Co., and have not access by railway to the last-mentioned premises. The defendants have running powers over the line and sidings leading to Messrs. Cooper & Co.'s premises, but only on the terms contained in s. 53 of the Midland Railway Company's Additional Powers Act, 1867, which make it more costly to use such powers than to cart through the streets, and such powers have in fact never been exercised.

14. The defendants and the Midland Railway Company equally profess to carry to all towns in England, Scotland, or Wales, and to most of these towns they have equal facilities of access. Where the access is substantially quicker by one railway than the other the brewers are practically compelled by their customers to make use of the railway giving the quicker access. There are towns to which the plaintiff and all or some of the three firms send goods, and there are towns to which the plaintiff sends goods, but to which the three firms do not.

15. The three firms in question can practically send the whole of their outward traffic by either railway, because they either send chiefly to towns to which the access is equally convenient by either railway, or to customers who are "tied," that is, who are under an obligation to purchase beer of a particular brewer. The plaintiff's trade is substantially an open trade. The inward traffic of the three firms, consisting mainly of barley, hops, and empty barrels, is not under their control to the same extent, but it amounts to only about one-eighth of their total traffic.

16. The defendants, having access by railway to the premises of Messrs. Ind, Coope, & Co., situated on the south side of the main line of the Midland Railway Company, have, since the year 1866 and during all the period to which this action relates, carried for Messrs. Ind, Coope, & Co., from and to the last-mentioned premises on the terms set out in paragraphs 5 and 6.

17. The defendants have, as to Messrs. Truman, Hanbury, Buxton, & Co.'s premises, and as to Messrs. Ind, Coope, & Co.'s

premises, north of the said main line, during all the period to which this action relates, and as to Messrs. Cooper & Co.'s premises since the year 1872, carried to and from such premises in the manner described in paragraph 4; but although they have carted all the goods they have so carried, they have done such cartage gratuitously, and have not charged the said firms 1*s.* per ton, or any sum whatever, for such cartage; and the defendants have also allowed to the said three firms the rebate or deduction of 9*d.* per ton on all the goods they have so carried, although they have in fact loaded and unloaded such goods for the three firms, and have afforded, in respect of such goods, the ordinary accommodation of their goods station.

18. If the defendants had not so carted gratuitously, and had not made such rebate or allowance of 9*d.* per ton, Messrs. Truman, Hanbury, Buxton, & Co. and Messrs. Cooper & Co. would have diverted to and sent by the Midland Railway Company substantially the whole of their outward traffic, and all three firms would have diverted to and sent by the Midland Railway Company such of their inward traffic as they could influence.

19. The defendants so carted gratuitously, and so made such rebates and allowances to the three firms, with the view of securing a share of the traffic of the three firms, which was considerable and yielded a profit after allowing the 9*d.* per ton and doing the carting gratuitously, and to prevent its being, so far as the three firms could do so, diverted and sent by the Midland Railway Company, and not with the intention of prejudicing the plaintiff; but the having such gratuitous cartage done, and such rebate or allowance made by the defendants, is an advantage to the three firms. If the defendants had not so carted gratuitously, and had not made such rebate or allowance as aforesaid, the plaintiff would have gained no positive advantage, inasmuch as his traffic would not have been carried at a cheaper rate, but the three firms would have lost the advantage of being able to have their traffic carried by either railway on the same terms, and the defendants would have lost substantially the whole of their outward traffic and a portion of their inward traffic.

20. From the year 1863 down to March, 1874, the plaintiff and some other brewers in Burton employed a man named Ball as

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

their traffic manager to settle and adjust their freightage accounts with the three railway companies, and to conduct their correspondence with the railway companies relating to the traffic. Ball was aware that the defendants were carrying for the three firms on the terms mentioned in paragraph 17, but for reasons of his own, and contrary to his duty to his employers, he concealed such knowledge from them, and the plaintiff, although he heard some rumours in the spring of 1874, did not get reliable information of what the defendants were doing until August or September, 1874.

21. On the 7th of January, 1875, the plaintiff and other brewers wrote to the defendants complaining of the free cartage so done, and the rebate and allowance so made by them to Messrs. Truman, Hanbury, Buxton, & Co. and Messrs. Cooper & Co., and asking for the repayment of the various amounts which they had overpaid to the defendants, and on the 30th of January following they made an application to the Railway Commissioners under the Regulation of Railways Act, 1873, in which they complained that the defendants carried for Messrs. Truman, Hanbury, Buxton, & Co. and Messrs. Cooper & Co. as stated in paragraph 17, and asked for an order that the defendants should desist from such practice, which they alleged to be an undue preference.

22. On the 10th of March, 1875, the Railway Commissioners granted the injunction applied for.

23. In pursuance of the injunction so granted, the defendants ceased, on the 31st of March, 1875, to cart gratuitously for and to make the rebate or allowance to the three firms as stated in paragraph 17, and the consequence is that they have lost substantially the whole of the outward traffic of Messrs. Truman, Hanbury, Buxton, & Co. and Messrs. Cooper & Co., and some small part of the inward traffic of the whole of the three firms.

24. The question for the Court is, whether the plaintiff is entitled to recover the whole or any part of the sum of 1*s.* 9*d.* per ton upon goods carried by the defendants for him under the circumstances described, and upon which he has paid cartage during the six years before the commencement of this suit. (1)

The Court is to have power to draw inferences of fact.

(1) The writ of summons was issued on the 13th of April, 1875.

Jan. 19. *A. Wills, Q.C.* (*Gould* with him), for the plaintiff. The facts stated shew that the defendants have contravened the provisions of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2 (1), for the plaintiff does not enjoy the same advantages with

(1) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 3, "The following words and expressions . . . . shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction . . . . the word 'toll' shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway."

Sect. 90: "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

Sect. 97: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriage or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law."

By 9 & 10 Vict. c. cciv. s. 2, the Railways Clauses Consolidation Act, 1845, is made to apply thereto; and by s. 3 the defendants were constituted a body corporate.

By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable pre-

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

respect to traffic upon their line as are granted by them to the three firms whose premises are connected with the Midland Railway by sidings; he is therefore entitled to recover in the present suit the difference between the amounts actually paid to the defendants and the amounts which he would have had to pay if he had been charged at the same rate as the three firms.

[LUSH, J. What is the authority for saying that an action will lie to recover alleged overcharges by a railway company in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2? A remedy by injunction under the latter statute may be obtained in some instances when no redress is allowed by action: *Barker* v. *Midland Ry. Co.* (1); *In re Marriott.* (2)]

Great Western Ry. Co. v. *Sutton* (3), shews conclusively that an action will lie in the present case.

[MELLOR, J. *Lancashire and Yorkshire Ry. Co.* v. *Gidlow* (4) is an authority to the like effect.]

Possibly at common law the defendants would not be bound to carry the plaintiff's goods at the same rates as those of the three firms, for though the hire charged by a carrier must be reasonable, it need not be uniform: Chitty on Contracts, 10th ed. chap. 3, sect. 2, p. 441; but the statutes already mentioned clearly impose the duty of treating upon equal terms all persons dealing with the defendants, and they are not justified in charging a higher rate to the plaintiff on the ground that large sums have been expended in connecting by sidings the premises of the three firms with the line of the Midland Railway Company, and that if the defendants did not make the allowance complained, the traffic of the firms would be diverted to that company: *Harris* v. *Cockermouth and Workington Ry. Co.* (5) It has been decided that a railway company cannot

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ference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

(1) 18 C. B. 46; 25 L. J. (C.P.) 184.

(2) 1 C. B. (N.S.) 499; 26 L. J. (C.P.) 154. 3 Jur. N.S. 493

(3) Law Rep. 4 H. L. 226.

(4) Law Rep. 7 H. L. 517.

(5) 3 C. B. (N.S.) 693; 27 L. J. (C.P.) 162. 4 Jur. N.S. 239

charge a customer for a service which he does not require to be performed: *Garton* v. *Great Western Ry. Co.* (1); *Garton* v. *Bristol and Exeter Ry. Co.* (2); and upon a similar principle the defendants were not entitled to charge the plaintiff for services which they performed gratuitously for other customers. Then the plaintiff is not bound by the conduct of Ball, who was acting dishonestly towards him.

[PER CURIAM: The defendants were guilty of no fraud, and the plaintiff is bound by the settlement of accounts made whilst Ball was in his service.]

At all events, the plaintiff is entitled to recover for the period which elapsed between the end of Ball's service and the commencement of this action.

J. W. Mellor, *Q.C.* (*J. S. Dugdale*, with him), for the defendants. The plaintiff cannot recover any part of the alleged overcharges; for his agent, though he may have acted fraudulently towards his employer, was of course aware of the terms upon which the defendants dealt with the three firms; as the plaintiff was at one time legally, though not actually, affected with notice, it must be taken that he had notice of the gratuitous cartage and of the rebate at the time when he settled accounts with the defendants after the service of Ball had terminated.

[MELLOR, J. That argument is not sustainable; it is a convenient doctrine that the knowledge of the agent is the knowledge of the principal; but it is not of unlimited application.]

Before any redress can be obtained under 17 & 18 Vict. c. 31, s. 2, there must be an intention on the part of the company to favour particular persons, per Kindersley, V.C., in *Attorney General* v. *Great Northern Ry. Co.* (3) Here it is expressly found that the company only desired to protect themselves, and therefore the statute is inapplicable.

[LUSH, J. The remarks of the Vice-Chancellor, must be read with reference to the facts before him; he intended to point out that, as the defendants in that case were inflicting a public and

(1) 5 C. B. (N.S.) 669; 28 L. J. (C.P.) 158. 5 Jur. N.S. 685

(2) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306. 5 Jur. N.S. 1313

(3) 1 Dr. & Sm. 154, at p. 163; 29 L. J. (Ch.) 794, at p. 801. 6 Jur. N.S. 1006, 1010

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

not merely a private wrong, they were liable to be restrained by an injunction issuing out of the Court of Chancery.]

In order to succeed, the plaintiff ought to shew that he has sustained damage; an injury personal to himself must be the foundation of his claim; and upon the facts stated, no wrong has been inflicted upon him. The real sufferers by the allowances made by the defendants to the three firms are the Midland Railway Company. Large sums have, no doubt, been expended in connecting the respective premises of the three firms with the line of the Midland Railway Company; and they are now reaping the benefit of the capital which has been invested in constructing the sidings. A railway company may, for an adequate consideration, agree to carry at a lower rate, provided that their motive in so doing is only to increase their traffic and thereby to benefit themselves: *Nicholson* v. *Great Western Ry. Co.* (1), and this is all that the defendants have done: they have shewn no "undue," that is, unreasonable preference, for if they had not dealt with the three firms upon the terms complained of, almost the whole of the traffic would, as it appears from paragraph 23, have passed to the Midland Railway Company, who have been the real gainers by the proceedings before the Railway Commissioners. Further, although the interpretation given to the word "tolls" in s. 3 of the Railways Clauses Consolidation Act, 1845, is somewhat extended, it must be in s. 90 understood in its ordinary signification, that is to say, as meaning the consideration for allowing goods to be carried over the company's line in the carriages of their owners; this has been decided to be the sense of the word in s. 97: *Wallis* v. *London and South Western Ry. Co.* (2); s. 90 is therefore inapplicable to the present case.

A. Wills, Q.C., replied.

Cur. adv. vult.

Feb. 2. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

MELLOR, J. We are of opinion that the gratuitous cartage and

(1) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89. (2) Law Rep. 5 Ex. 62.

4 Jan 1877.

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

the allowance of rebate granted by the defendants to the three brewing firms mentioned in the case, but not granted to the plaintiff, although made bonâ fide for the simple purpose of attracting their traffic to the defendants' line of railway, in lieu of its being sent by competing lines, and although such traffic realized a profit to the defendants notwithstanding such an allowance or rebate, did, under the circumstances, amount to an undue preference or advantage given to them by the defendants' company, and is contrary to the language and meaning of the equality clause, 8 & 9 Vict. c. 20, s. 90, and also of 17 & 18 Vict. c. 31, s. 2; and we think therefore, that the plaintiff is entitled to recover the overcharges made to him by the defendants, which must be measured by the value of the services gratuitously rendered to the three firms, viz., Messrs. Truman, Hanbury, & Co., Messrs. Ind, Coope, & Co., and Messrs. Cooper & Co., as described in paragraphs 17 and 18 of the special case.

Primâ facie, the conduct of the defendants, in charging the plaintiff who carried on a like business with the three brewing firms last mentioned, 1*s.* per ton for cartage, and making no allowance to him as a rebate on the rate of carriage of his goods, amounts to an undue preference to the three firms in question, and constitutes a violation of the equality clauses, which regulate charges allowed to be made by railway companies to persons sending traffic of the like kind on the same line and by the same description of train, and unless some answer is to be found in the special circumstances of the present case, we cannot doubt that it is within the mischief intended to be provided for by the provisions of the several Acts above referred to. No doubt, dicta and decisions are to be found to the effect that the legitimate interests of competition with rival lines are not to be lost sight of, and that if the traffic of one firm is less costly to the carrying company than that of another, owing to special circumstances, so that an equivalent merely is given for the difference in cost, a sum may be deducted bonâ fide in the one case which is not allowed in another, if the company making the difference have only the interest of the proprietors in view, and the legitimate increase of the profits of the railway. Again, when that firm to whom an allowance is made undertakes

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

to send regular and complete loads, producing a certain adequate increase of economy and profits to the company, that may be a sufficient consideration for a differential charge: *Nicholson* v. *Great Western Ry. Co.* (1)

In the present case the ground for the difference in charge between the three firms and the plaintiff, is based upon the fact that the three firms are connected with other lines running into the same districts by sidings and connections, which have been made at great expense by these firms, and which enable them to send their traffic by the other lines at as low a rate as the defendants charge them after making the deduction and rebate of 1*s.* 9*d.*, and that it is therefore within the line of legitimate and fair competition to endeavour to obtain the traffic of the three firms by equalizing in this way the cost of conveyance. It is stated that the differential rate-charge to the plaintiff as against the three firms is nevertheless remunerative to the defendants, and is done bonâ fide for the sole purpose of attracting traffic from the other lines with which the three firms are so connected; and that after all the goods of the three firms find their way to their destination by the defendants' line at the same cost to the senders as they would if sent by the rival lines; and the contention is, in the present case, that the only interests which are prejudicially affected by this mode of dealing are the interests of the rival lines of railway.

It is argued that, by this mode of dealing, the defendants only allow to the three firms an adequate compensation for the advantageous position which they have acquired, by the expense of constructing the connections and sidings which they have been able to make with the rival lines; and it appears that the effect of the defendants being restrained from continuing these deductions and allowances to the three firms has been to cause them to send their traffic by the rival lines, and that the plaintiff derives no advantage from the change, as he has still to pay the same rate as before, and the three firms availing themselves of their special advantage get their goods carried at a rate equivalent to that paid by them before.

We are unable to give effect to this reasoning. The simple fact

(1) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89. 4 Jur. N.S. 1057.

remains that the defendants did make a differential rate between the plaintiff and the three firms for the very same services, and that by such a course of charge the plaintiff paid 1*s.* 9*d.* per ton more for getting his goods to the same market by the same or similar trains, and carried under the same circumstances of risk and cost to the defendants, and that it is not the less an undue and preferential charge as between the plaintiff and the defendants, because the three firms were possessed of the advantage of a connection with rival lines, which enabled them to send their goods by those lines at an equivalent rate of charge. We therefore agree with the judgment of the Railway Commissioners and the reasoning upon which it is founded, as reported under the name of *Thompson and Others* v. *London and North Western Ry. Co.* (1) We think that a railway company cannot merely for the sake of increasing their traffic reduce their rates in favour of individual customers, unless, at all events, there is a sufficient consideration for such reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic. It is not easy to distinguish the consideration suggested in the present case from that suggested in *Harris and Others* v. *Cockermouth and Workington Ry. Co.* (2), the only difference being that in the present case the circumstances actually exist which were there threatened.

It is too late to contend that the principle of the equality clause, 8 Vict. c. 20, s. 90, only applies to tolls for the use on the railway of carriages not belonging to the railway, and the decision to which Mr. Mellor referred, of *Wallis* v. *London and South Western Ry. Co.* (3), was not upon this question, but upon the 97th section of 8 Vict. c. 20, and turned upon other considerations. It must, we think, be considered as settled that the 90th section of 8 Vict. c. 20, as well as the provisions of 17 & 18 Vict. c. 31, and 36 & 37 Vict. c. 48, apply to traffic generally, and are not limited to tolls strictly so called.

The only remaining question made before us is whether, under

(1) 2 Nev. & Mac. 115. (2) 3 C. B. (N.S.) 693; 27 L. J. (C.P.) 162.
(3) Law Rep. 5 Ex. 62.

1877

EVERSHED v. LONDON AND NORTH WESTERN RAILWAY CO.

the circumstances, the action for money had and received would lie against the defendants to recover back the over-charges made by the defendants to the plaintiff, and from what time; that the action will lie is settled by the highest authority: *Great Western Ry. Co.* v. *Sutton.* (1)

During the argument by Mr. Wills, we intimated our opinion that the payments made for carriage and freightage, as adjusted and settled by Ball in the manner described in paragraph 20, bound the plaintiff, and that none of those payments could be recovered back. But we are of opinion that from the time when Ball last settled accounts up to September, 1874, when the plaintiff acquired knowledge of the inequality, he is entitled to recover back the over-charges as having been paid in ignorance of the facts; and from the 7th of January, 1875, down to the date of the writ, as having been paid under compulsion. We have entertained some doubt as to the period between September, 1874, and the 7th of January, 1875; but as nothing is said of any protest or complaint until January, we are of opinion that the payments made during that period must be considered as voluntary payments, and cannot therefore be recovered back. Our judgment will consequently be for the amounts of payments made during the periods mentioned, to be ascertained by the arbitrator, and for such costs as may be agreed upon, or as he shall settle and determine.

Judgment accordingly.

Solicitors for plaintiff: *Dobinson, Geare, & Son.*
Solicitor for defendants: *R. F. Roberts.*

(1) Law Rep. 4 H. L. 226, at pp. 262, 263.

THE QUEEN *v.* GUARDIANS OF IPSWICH UNION.
SAME *v.* GUARDIANS OF THE ASTON UNION.
SAME *v.* GUARDIANS OF THE BURTON-UPON-TRENT UNION.

1877
April 14.

Poor Law—Settlement by Residence—Removal—39 & 40 *Vict. c.* 61, *s.* 34.

The 34th section of 39 & 40 Vict. c. 61 enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise," &c.:—

Held, that a person who had resided in a parish for a term of three years, but whose residence therein had ended before the passing of the Act, did not acquire a settlement therein under the section.

6 Q B D 33-4
7 Q B D 386
8 Q B D 160
16 L. J. 3-4

SPECIAL cases stated by quarter sessions on appeals against orders of removal, the sessions in each case having confirmed the order.

The validity of the order of removal in each case depended on the question whether a person had obtained a settlement under the 34th section of 39 & 40 Vict. c. 61, in a parish in the union upon which the order of removal was made.

In each case such person had resided in a parish of such union for a period of three years, expiring before the 15th of August, 1876, the date of the passing of the Act, but had ceased to reside in the parish before such 15th of August.

The court of quarter sessions had in each case decided that a settlement was obtained under the Act.

Metcalfe, Q.C. (*Temple Cooke* with him), *Buszard, Q.C.* (*A. P. Stone* with him), and *Clerk* for the respondents in the respective appeals.

The 34th section of 39 & 40 Vict. c. 61 is retrospective, and the period of three years therein mentioned may be a period complete before the passing of the Act. The intention of the legislature was to sweep away the existing complications and to establish one uniform, easily ascertainable test, viz. whether the

1877

THE QUEEN v. IPSWICH UNION.

pauper at any time has resided three years. The 36th section is very strong to shew that the 34th section is retrospective.

Graham (*Poyser* with him), *Meadows White, Q.C.* (*J. C. Carter* with him), and *Lumley*, for the appellants in the respective appeals, were not called upon.

COCKBURN, C.J. These orders must be quashed. I cannot doubt that the 34th section was intended to have a prospective and not a retrospective effect. It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act. It is suggested here that the Act is to extend to a state of facts that may have ceased to exist nearly thirty years back. In my opinion the words of the section will not lend themselves to that construction. The whole of the language is prospective. For instance, the words are, "shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." The respondents' contention would require some such words as "unless he shall have in the meantime acquired," &c. I cannot think, looking to the language, that the legislature can have intended to provide that a period of residence complete, it might be years before the Act, should give a settlement. The intention appears to have been to enact that where a person should be irremovable by reason of having resided for a period of three years, he should have a settlement where he had so become irremovable. That appears to be a very useful and reasonable enactment. But I cannot suppose that it was intended to go back years and years and give the pauper a settlement in any place in which he has once resided for three years, but which he has long since left.

Our judgment must be for the appellants.

MELLOR, J. I am of the same opinion. I think the language of the section is amply sufficient to support the contention of the appellants. In the first of these cases the father of the pauper went to America in 1873, probably for good, and it is contended by the respondents that the statute operates upon him so as to

give him a settlement, though his status of irremovability has long since been destroyed. I cannot think that the section was intended to apply where the status of irremovability has been lost before the passing of the Act.

Orders of sessions quashed.

Solicitors for appellants: *Bromley, for Ross; Beale, Marigold, & Beale; Wilkins, for Goodger.*

Solicitors for respondents: *Torr & Co., for Danby Palmer; Carey, Warburton, & Co.*

WRIGHT *v.* THE LONDON GENERAL OMNIBUS COMPANY. *April* 25.

Res judicata—Award of Compensation by Magistrate for Damages caused by furious driving a bar to further proceedings—6 & 7 Vict. c. 86, s. 28.

An award of compensation by a magistrate against the driver of a hackney or metropolitan stage carriage upon an information for furious driving, under 6 & 7 Vict. c. 86, s. 28, is a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries.

If the party injured accepts such compensation he is barred from further proceedings, even where he did not lay the information or, in the first instance, request the magistrate to award compensation.

THIS was an action of tort remitted to the county court for trial under 30 & 31 Vict. c. 142.

The plaintiff, a cabman, sued for damages in respect of injuries occasioned by the furious and negligent driving of an omnibus driver in the defendants' employ. The facts, as appearing from the county court judge's notes, were as follows: It appeared that the driver had been racing with another omnibus driver, and had come into collision with the plaintiff's cab, causing the damage complained of. The police took out a summons against both the drivers, for furious driving, under 6 & 7 Vict. c. 86, s. 28. On the hearing before the magistrate, he convicted both the drivers and fined each of them 3*l.* He then asked the plaintiff, who appeared as a witness, whether 10*l.* would be sufficient compensation for the damage he had sustained. The plaintiff said that it would not, but the magistrate nevertheless awarded him the sum of 5*l.* against each of the drivers by way of compensation under the provisions of

1877

WRIGHT v. LONDON OMNIBUS CO.

the above-mentioned Act, and these amounts were paid into Court by the drivers respectively, and received by the plaintiff. The company set up as a defence to the action that the award of compensation by the magistrate was a bar to any further recovery of compensation by the plaintiff. The plaintiff's counsel offered to allow a deduction in respect of the compensation awarded from any sum which the jury might assess as damages. The county court judge refused to give effect to the defence and left the case to the jury, who found for the plaintiff. The verdict was thereupon entered for the plaintiff for 95*l.* The defendants appealed against this decision, and a rule nisi had been obtained to set aside the verdict and enter a nonsuit or for a new trial on the ground of misdirection. (1)

Francis shewed cause. The award of compensation by the magistrate against the driver is not a bar to further proceedings against the company. There is nothing in the statute to shew that the compensation so awarded is intended to be in full of all compensation. When it is intended that the summary proceedings shall be a bar to proceedings by way of action, as in the statutes that have from time to time provided for summary proceedings in the case of assaults, the legislature has used express words to that effect. The jurisdiction of the magistrate only goes up to 10*l.*, and when he awards compensation there is a satisfaction of any damages pro tanto, but if, as here, the amount he can award is wholly inadequate, there is nothing unreasonable in the plaintiff's being at

(1) 6 & 7 Vict. c. 86, s. 28: "Every driver of a hackney carriage or driver or conductor of a metropolitan stage carriage who shall be guilty of wanton or furious driving, or who by carelessness or wilful misbehaviour shall cause any hurt or damage to any person or property being in any street or highway, &c., shall for every such offence forfeit the sum of three pounds . . . And in every case where any such hurt or damage shall have been caused, the justice, upon the hearing of the complaint, may adjudge as and for compensation to any party aggrieved as aforesaid a sum not exceeding ten pounds, and may order the proprietor of the hackney carriage or metropolitan stage carriage, &c., forthwith to pay such sum, &c.; and any sum which shall be so paid by the proprietor shall in like manner be recovered in a summary way, before a justice of the peace, from the driver or conductor, &c.; or it shall be lawful for the justice in the first instance to adjudge the amount of such compensation to be paid by such driver or conductor to the party aggrieved."

liberty to proceed further. Again, assuming that if the plaintiff were a party to the proceedings before the magistrate he would have been barred, the plaintiff here was not a party complaining before the magistrate. The information was laid by the police, and the plaintiff, on appearing as a witness, did not ask the magistrate to award compensation, but, on the contrary, stated that 10*l.* would not be sufficient. The mere fact of his afterwards receiving the amount awarded is immaterial. He did not receive it in full of the compensation to which he was entitled, but only on account of it. It cannot, therefore, be taken that he assented to the magistrate's finally determining the amount of compensation. He therefore neither set the jurisdiction of the magistrate in motion, nor did he subsequently assent to its exercise.

[He cited *Lee* v. *Lancashire and Yorkshire Ry. Co.* (1)]

A. Cock, in support of the rule, was stopped by the Court.

COCKBURN, C.J. I am of opinion that this action is not maintainable. The question turns wholly on the construction of 6 & 7 Vict. c. 86, s. 28. That section first provides for the infliction of a penalty on the driver misconducting himself, and then goes on to provide that compensation may be awarded by the magistrate to the party aggrieved either against the proprietor of the hackney carriage or metropolitan stage carriage, in which case the proprietor may recover the amount from the driver, or against the driver himself in the first instance. It is true that the amount of compensation which the magistrate can award is limited to 10*l.*, and it was no doubt intended that the provisions of the section should only be put in force when the damage done was slight. Here the sum of 10*l.* was not adequate to the damage done, but that circumstance is immaterial when we come to look at the legal effect of what took place on the plaintiff's position. The magistrate here convicted the two drivers, and inflicted a penalty of 3*l.* on each of them. He then went on to award the sum of 5*l.* as compensation to be paid by each of the drivers to the plaintiff. I think that such award of compensation is binding on the plaintiff, and prevents this action from being maintainable. Assuming at present that the plaintiff was a party complaining

(1) Law Rep. 6 Ch. 527.

1877

WRIGHT v. LONDON OMNIBUS CO.

before the magistrate, and asking for the exercise of this jurisdiction, it was admitted that if the award of compensation by the magistrate had been against the company itself, the plaintiff could not have proceeded further. Having appealed to the special jurisdiction given under the Act he must abide the result, and could not obtain a further award of compensation against the company by another tribunal. It is also clear that if the plaintiff had asked for and obtained compensation against the company he could not proceed to claim further compensation against the driver. The party damaged cannot obtain compensation both against the master and against the servant. Either the master can be rendered liable or the servant, but not first one and then the other. So when the magistrate awards compensation against one, the party aggrieved cannot afterwards proceed against the other. It seems to us that when the jurisdiction given by the section is exercised and compensation is awarded, the award is in full of the whole compensation recoverable by the party damaged, and he cannot recover anything more. The argument most relied on for the plaintiff was that he was not a complaining party, and that the compensation was awarded to him contrary to his wishes, and, consequently, the award does not bind him. It is true that the plaintiff did not originally ask for the exercise of the jurisdiction given by the section, but in the course of an inquiry upon a complaint made by other parties, the magistrate expresses his intention of awarding compensation, and asks if 10*l.* will be sufficient. The plaintiff answers that it will not; but, nevertheless, when the magistrate proceeds to award this amount to him, he takes it. It seems to me that by taking the 10*l.* he consented to the exercise of the jurisdiction, and was bound by it. Suppose on a complaint by the police against a driver for furious driving, the magistrate having inflicted a penalty, and not proposing to make any further order, the party damaged had stood forward and asked for compensation, surely he would be bound by the award of compensation as much as if he had laid the information. This case is not quite the same, but it comes within the same principle. By taking the money the plaintiff must be taken to have acquiesced in the magistrate's determining the question of compensation, though the award was insufficient to compensate him. The fact that he was

ignorant probably of the legal effect of his acting as he did can make no difference. He cannot claim further compensation after consenting to the exercise of the magistrate's jurisdiction by accepting the compensation awarded to him. I think it is a pity, under the circumstances, that the magistrate did not inform the plaintiff what the effect of allowing him to award compensation would be, for I am afraid that the plaintiff was misled, and thought that he was not prejudicing his right to recover further compensation against the company. I hope that this case may operate as a warning to magistrates in other cases to prevent such a misconception, but the plaintiff's ignorance of the law cannot enter into consideration in determining the legal result of his consenting to the award of compensation. The rule must be made absolute to enter a nonsuit.

MELLOR, J. I am of the same opinion. The provisions of the 28th section of 6 & 7 Vict. c. 86, with regard to awarding compensation to the party aggrieved, are not confined to cases where the complaint is made by such party. The words of the section are very wide. The complaint against the driver for furious driving may be made by the police or any other person, but, "in every case," whether such complaint is by the party aggrieved or not, the magistrate may, where hurt or damage is caused to any person or property, "adjudge as and for compensation to the party aggrieved, as aforesaid, a sum not exceeding 10*l*." I do not think it possibly could be intended that the compensation in such a case should be recovered piecemeal, partly before the magistrate and partly elsewhere. The meaning appears to me to be that where the party considers that the compensation may be covered by an amount not exceeding 10*l*., in that case the magistrate shall determine the amount of compensation. The provision appears to me to be a very advantageous one with regard to the cases it was intended to meet, though in the present case the plaintiff seems to have availed himself of it in ignorance of the legal effect of what he was doing. It is intended to give to the party aggrieved a speedy and convenient mode of recovering in respect of slight injuries by means of the summary jurisdiction of the magistrate, so that when the complaint is brought before the

1877

WRIGHT v. LONDON OMNIBUS CO.

magistrate with regard to the driver's misconduct, the whole matter may be settled, and the party injured may recover his compensation without being sent to the county court or compelled to engage in further litigation. It appears to me that there is no reservation of any further right of compensation, and that if the party aggrieved avails himself of the summary remedy given by the section he cannot afterwards proceed elsewhere. The plaintiff in the present case submitted himself to the magistrate's jurisdiction, in my opinion, by accepting the amount of compensation awarded. The matter thus became res judicata, and cannot be re-opened.

Rule absolute.

Solicitors for plaintiff: *Weed & White.*

Solicitors for defendants: *Stevens, Wilkinson, & Harrison.*

April 18.

WHITELEY AND WIFE *v.* PEPPER.

Negligence—Master and Servant—Coal Grate in Highway.

The carman of the defendant, a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries:—

Held, in an action against the defendant for negligence, that he was responsible.

Pickard v. *Smith* (10 C. B. (N.S.) 470) considered.

APPEAL from the decision of the county court.

The facts were as follows:—The action was in respect of injuries received by the female plaintiff, in consequence of the negligence of the defendant's servant in leaving a coal grate in the footpath open.

The defendant was a coal dealer. He had an office at a railway station at which orders for coals were received, and coals were sent out by him from the station in pursuance of the orders so received.

The whole duty of the men employed by the defendant to deliver coals to customers consisted in delivering such coals.

1876

WHITELEY v. PEPPER.

On the 26th of January, 1876, a carman of the defendant, named Hopper, was delivering coals at the house of a customer named Walton.

In order to deliver the coals it was necessary to raise an iron plate in the pavement. The plate was fastened by a chain from the inside, and there was a hook at the end of the chain going into a staple in the interior of the house. Under the iron plate was an inclined plane by means of which the coals were shot into the cellar. The chain was unhooked by some person in Walton's employ, and Hopper then raised the iron plate, opened the shoot, and went to the tail of his cart, which was standing parallel to the pavement with the horse's head towards the direction from which the female plaintiff was coming. He removed the tail board and placed it against the wheel nearest the pavement, and then went to the tail of his cart. Two women then came along the pavement, and he called out to them, "Mind, the grate is up." The female plaintiff followed behind the two other women, but not near enough to hear the warning given to them, and Hopper gave her no warning, and without any want of due care on her part she fell into the coal shoot, and sprained her ankle and sustained other damage.

It was submitted that there was no evidence of negligence on the part of the defendant, and that the defendant was not liable on the authority of the dictum of Williams, J., in *Pickard* v. *Smith*. (1)

The judge refused to nonsuit, and ruled that every one who interfered with a public highway so as to render it dangerous to passengers was bound to guard against such danger, and that the servant of the defendant having in the course of his employment neglected this duty the defendant was liable.

The judge found a verdict for the plaintiff for 21*l*. damages. The question for the Court was whether he was right in so doing.

Cave, Q.C., for the defendant. In the case of *Pickard* v. *Smith* (1) Williams, J., expressed an opinion that the coal merchant under similar circumstances would not be liable. It was held in that case that the occupier of the premises was liable.

(1) 10 C. B. (N.S.) 470.

1877

WHITELEY v. PEPPER.

[FIELD, J. The dictum was merely thrown out in the course of the argument. There is nothing in the judgment of the learned judge that helps the defendant.]

The coal merchant's contract is only to deliver the coals. The occupier is bound to see that any arrangement on his premises for taking delivery is not dangerous to the public. The defendant's servant has no authority to deal with the coal grate except by the occupier's consent, and so far as he deals with it he is the occupier's servant, and not the defendant's. It is not the coal dealer's interest that the coals should be delivered in one way more than in another. It is for the benefit of the customer that they are delivered in that or any other particular way which entails increased risk to the public.

Horne Payne, for the plaintiff, was not called upon.

MELLOR, J. I am of opinion that the county court judge was right, and that his decision must be sustained. The defendant's counsel contends that all responsibility connected with the delivery of coals in the way here adopted lies upon the customers only. I cannot agree with that contention. It may be that in this case an action would lie against the occupier of the premises, but it is clear to my mind that an action lies against the defendant for the negligence of his servant. It is the common case of negligence by a servant in the scope of his employment for which the master is responsible. The dictum of Williams, J., is no doubt entitled to very great respect, but it is to be observed that the judgment in the case of *Pickard* v. *Smith* (1) merely decides that the occupier was responsible; we do not say that there was not abundant justification for that decision, and there is no expression in the judgment itself which at all conflicts with our decision.

FIELD, J. I am of the same opinion. It is not necessary to say whether in this case the occupier of the premises would be liable. The only question is, whether the judge was right in holding that the defendant was liable. The coal grate was in a highway, over which the public had a right to pass, and the defendant by his servant raised the plate which protected passengers from the opening into the cellar. Into this opening the

(1) 10 C. B. (N.S.) 470.

1877

WHITELEY v. PEPPER.

plaintiff, without any negligence on her part, fell. There was nothing unlawful in removing the plate if the carman had taken due precaution to protect the public from accidents, but it is found that there was a want of care on his part. It seems to me clear on these facts that the case falls within the ordinary principles upon which a master is rendered liable for the negligence of his servant. The only difficulty is that created by the supposed dictum of Williams, J., in *Pickard* v. *Smith*. (1) But there is really nothing in the judgment in that case, or the reasoning on which it is founded, which conflicts with our present decision.

Decision affirmed.

Solicitors for plaintiffs: *Ridsdale, Craddock, & Ridsdale, for Crumlin.*

Solicitors for defendant: *Whittakers & Woolbert, for Paley.*

VENABLES *v.* SMITH.

May 2.

Hackney Carriage—Cab Proprietor and Driver, relation between—Master and Servant—Bailor and Bailee—Negligence—Scope of Employment.

The plaintiff was run over and sustained injuries through furious driving on the part of a cab driver, and brought his action for such injuries against the proprietor of the cab. The arrangement between the proprietor and the driver was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16*s.* for the cab; all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred, the driver was on his way back with the cab to the stables of the proprietor intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened:—

Held, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was intrusted to him, as a master for the acts of his servant, and that the driver was at the time of the accident so acting.

Powles v. *Hider* (6 E. & B. 207; 25 L. J. (Q.B.) 331) followed.

ACTION against a cab proprietor for injuries occasioned to the plaintiff by furious driving on the part of a cab driver in

(1) 10 C. B. (N.S.) 470.

1877

VENABLES v. SMITH.

defendant's employ. The action had been remitted to the Marylebone County Court for trial under s. 10 of the County Courts Act, 1867. It was agreed that the case should go to the jury with regard to the question of damages, but that the following two questions should be decided as matters of law by the county court judge, viz., whether the relation of master and servant existed between the defendant and the cab driver; and whether, if so, the cab driver, at the time when he caused the injuries complained of, was acting within the scope of his employment. As to these two points the county court judge stated the facts as follows:—

The cab driver hired the cab, with the use of two horses, from the defendant, at 16*s.* a day. He had no specified time of starting from or returning to the stables; but he started early in the morning to get back early at night. The cab had no name on it, but there was the defendant's number on it granted to him for the cab. Whatever the driver got over 16*s.* was his perquisite for his labour, and any deficiency was his own loss to be made good afterwards. On the day on which the accident happened, the driver had set down his last fare at South Bank, St. John's Wood, at about 9 P.M., and was on his way home to the stables, having finished for the day. He went down Gloucester Place, across Portman Square (the stables being in Great York Mews, Baker Street), into Portman Street. At the end of Portman Street there is a tobacconist's shop. He had reached the top of York Mews, at the Gloucester Place end, when he thought he would get some snuff at the tobacconist's. The distance to the shop was about a quarter of a mile; no distance, the driver said, for the horse, but more for him to go when he was tired. He went to get the snuff, and having done so proceeded to the stables, and whilst on his way there, the plaintiff was run over. The driver was drunk at the time, and driving furiously. The county court judge decided in favour of the plaintiff on both points, and the verdict was accordingly entered for 20*l.*, the damages found by the jury.

Against this decision the defendant appealed.

A rule nisi had been obtained to set aside the verdict, and to enter a nonsuit, or for a new trial, on the ground that the relation between the defendant and the cab driver was not that of master

and servant, but that of bailor and bailee, and that the driver was not acting within the scope of his employment when he caused the injuries complained of.

Russell Griffiths shewed cause. The case of *Powles* v. *Hider* (1) is an authority directly in favour of the plaintiff. See also *Morley* v. *Dunscombe.* (2) The ground of those decisions is that the statutes relating to hackney carriages impose upon the cab proprietor in respect of the acts of the cab driver the liability of a master for the acts of his servant. The provisions of 6 & 7 Vict. c. 86, ss. 10, 24, 27, and 28, shew that the legislature intended the cab proprietor to be liable for the acts of the cab driver. *Fowler* v. *Lock* (3) has not shaken the authority of *Powles* v. *Hider.* (1) In the Court below the judgment was wholly concerned with the question of the relation of the proprietor and driver inter se, which is a different question from that of their relation quoad the public, and in the Court of Exchequer Chamber no decision was given on the point of law.

With regard to the second point it is submitted that the driver was, when the accident happened, still occupied in the course of his employment. He was on his way home to the stables, though he went a somewhat roundabout way for the purpose of procuring snuff. But it was left entirely to his discretion where he should go with the cab in the course of his day's work.

[He cited 32 & 33 Vict. c. 115, s. 6; *Laugher* v. *Pointer* (4); *Quarman* v. *Burnett* (5); *Fenton* v. *City of Dublin Steam Packet Co.* (6); Story on Agency (7); *Whatman* v. *Pearson* (8); *Story* v. *Ashton* (9); *Mitchell* v. *Crassweller* (10); *Burns* v. *Poulsom.* (11)]

Willis, Q.C., Pike, and *Pain,* supported the rule. The cab driver was engaged in an independent journey wholly foreign to the employment. He was intrusted with the cab to ply for hire.

(1) 6 E. & B. 207; 25 L. J. (Q.B.) 331.
(2) 11 L. T. 199.
(3) Law Rep. 7. C. P. 272; 9 C. P. 751.
(4) 5 B. & C. 547.
(5) 6 M. & W. 499.
(6) 8 A. & E. 835.
(7) Page 407.
(8) Law Rep. 3 C. P. 422.
(9) Law Rep. 4 Q. B. 476.
(10) 13 C. B. 237; 22 L. J. (C.P.) 100.
(11) Law Rep. 8 C. P. 563.

1877

VENABLES v. SMITH.

His day's work was done, and he had come to the entrance to the mews when he thought that he would go on farther to get some snuff. This formed no part of the purpose for which as between himself and the proprietor the cab was trusted to him. *Story* v. *Ashton* (1) is in point in defendant's favour.

[COCKBURN, C.J. That class of cases is distinguishable. There the servant has certain specific orders as to the mode of dealing with the cart or whatever is the subject of his employment. If under those circumstances he employs it on some purpose wholly independent of his orders the master is not responsible. But here the cab is intrusted to the man generally. Suppose he goes out of his way to get some refreshment.]

Refreshment in the course of his day's work would stand on a different footing. Here the day's work was done.

[COCKBURN, C.J. The driver might have revoked his determination not to take another fare.]

Secondly, the relation was not that of master and servant, but bailor and bailee. *Powles* v. *Hider* (2) was the case of loss of a passenger's luggage, and a question of contract arose between the cab proprietor and the hirer. If the Hackney Carriage Acts create the relation of master and servant, that relation must be limited to the purposes of those enactments.

COCKBURN, C.J. The first question that arises is, whether the relation of master and servant existed between the defendant and the cab driver, so as to render the defendant responsible for the damage caused by the driver. I agree that, independently of the Acts of Parliament relating to this subject, the relation between them would be that of bailor and bailee, not that of master and servant. The cab proprietor hands over the horse and cab to the charge of the driver, to be used by him for the purpose of plying for hire at his own discretion and not subject to the proprietor's control. So far I agree with the reasoning of the majority of the Court in the case of *Fowler* v. *Lock*. (3) But I think that the provisions of the Acts of Parliament alter what would otherwise be

(1) Law Rep. 4 Q. B. 476. (2) 6 E. & B. 207; 25 L. J. (Q.B.) 331.
(3) Law Rep. 7 C. P. 272.

the relation of the proprietor and the driver, and for the protection of the public produce the result that, as regards mischief done by the driver, who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver. But then it is contended that the liability of the master only exists with respect to acts done by the driver within the scope of his employment, and that the driver here was not acting within the scope of his employment. To determine whether the driver was so acting or not it is necessary to consider what the terms were upon which the cab was intrusted to the driver. If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public. But it appears that the cab was intrusted to the driver to use entirely at his discretion, provided that he used it properly and returned it to the proprietor's stables when the day's work was over, paying the sum agreed upon between them for the hire of it. I cannot see that the driver did anything wrongful, or contrary to the terms of the bailment as between himself and the proprietor, in using the vehicle for the purpose of going to the tobacconist to get snuff. For these reasons I think the decision of the county court judge was right, and that the rule must be discharged.

MELLOR, J. I am of the same opinion. With regard to the first question, viz., whether the relation between the cab proprietor and the driver is that of master and servant, I am disposed to rest my judgment upon the decision in the case of *Powles* v. *Hider* (1), which seems to me in point. With regard to the question whether the driver was acting within the scope of his employment, it seems to me that by the terms of the arrangement between the proprietor and the driver the fullest discretion was vested in the latter as to how he should earn money. He was to return the cab when he had done with it, but he was not bound to return at any particular

(1) 6 E. & B. 207; 25 L. J. (Q.B.) 331.

1877

VENABLES v. SMITH.

moment, or to take any particular route. We must look at the matter from a reasonable point of view. If the driver were to take the cab on an independent journey, altogether out of the scope of the purposes for which it was intrusted to him, no doubt the proprietor could not be rendered responsible for acts done by him in the course of such journey, but I do not think the driver was in this case going on any such independent journey so as to relieve the master. It seems to me, therefore, that the decision should be affirmed.

Rule discharged.

Solicitor for plaintiff: *Berkeley.*
Solicitor for defendant: *Pain.*

May 2.

THE GREAT NORTHERN AND LONDON AND NORTH WESTERN JOINT COMMITTEE, APPELLANTS; INETT, RESPONDENT.

Costs—Case stated by Justices—Application to strike out of the Paper—Absence of Jurisdiction.

A case having been stated by justices under 20 & 21 Vict. c. 43, but the appellant not having complied with the conditions required by that Act, and there being consequently no jurisdiction to hear the case, the respondent applied by way of motion to strike the case out of the paper.

Application granted with costs against the appellants.

Peacock v. *The Queen* (4 C. B. (N.S.) 264), not followed with regard to the question of costs.

IN this case a rule nisi had been obtained on behalf of the respondent, to strike out of the paper a case stated by justices under 20 & 21 Vict. c. 43, on the ground that the case had not been transmitted by the appellants to the Court within three days after receiving such case, as required by the Act.

Charles, Q.C., shewed cause. It must be admitted that the objection is fatal: *Morgan* v. *Edwards* (1); but it is submitted that the Court will not make the rule absolute with costs. It is not the proper course to apply for a rule. The respondent might have taken this objection at the hearing of the case as was done

(1) 5 H. & N. 415; 29 L. J. (M.C.) 108.

1877

GREAT NORTHERN COMMITTEE v. INETT.

in *Peacock* v. *The Queen* (1), and cannot be in a better position as to costs than if he had done so. It was held in *Peacock* v. *The Queen* (1), that inasmuch as the Court had no jurisdiction to hear the case, it had no jurisdiction to give costs. *Brown* v. *Shaw* (2), is to the same effect.

Graham supported the rule. The proper course in such a case as this is to apply for a rule to strike the case out of the paper. There is nothing on the face of the case to shew the absence of jurisdiction, which must consequently be brought before the Court by affidavits. The appellant would have a right to an opportunity of answering such affidavits if he desired it, and so there would have to be a postponement and increased delay and expense if the objection were taken at the hearing. It is clear that the Court has jurisdiction to grant costs. In the recent case of *Diss Urban Sanitary Authority* v. *Aldrich* (3), this Court gave costs to the respondent, where it was held that there was no power to state a case under 20 & 21 Vict. c. 43. When a person comes before the Court, he submits to the general jurisdiction of the Court: *Peters* v. *Sheehan.* (4)

COCKBURN, C.J. It is clear that in this case the conditions precedent to the exercise of the jurisdiction have not been complied with. The respondent is entitled to avail himself of this objection, and he is obliged to come here to inform us of the absence of jurisdiction, for if he did not the objection would not appear, and judgment would be given against him. As he is obliged to come here by the act of the appellants, he is entitled to his costs. It is clear that, to some extent, there is jurisdiction over the subject matter, for the Court has jurisdiction to hear and

(1) 4 C. B. (N.S.) 264; 27 L.J. (C.P.) 224.

(2) 1 Ex. D. 425.

(3) *Diss Urban Sanitary Authority* v. *Aldrich* (ante, p. 179). When the decision in that case was given, the respondent applied for costs, and the counsel for the appellants contended on the authority of *Peacock* v. *The Queen* (4 C. B. (N.S.) 264) that they could not be given. The Court postponed their decision as to costs, and directed that counsel should look into the authorities and mention the case again. On the 18th of April, *Wills, Q.C.*, for the respondent, renewed his application for costs, and cited *McIntosh* v. *Lord Advocate* (Weekly Notes, May 6, 1876). The Court, Mellor and Field, JJ., then gave the respondent his costs.

(4) 10 M. & W. 213.

1877

GREAT NORTHERN COMMITTEE v. INETT.

determine whether the appeal will lie or not. I am of opinion that, under these circumstances, there is jurisdiction to give costs. That being so, it seems to me to make no difference in the practical result whether the respondent comes to inform the Court of the objection by means of a separate application as in the present case, or at the hearing. The appellants have been clearly wrong in proceeding with the appeal, and must abide the result of having compelled the respondent to appear before us.

MELLOR, J. concurred.

Rule absolute with costs.

Solicitors for appellants: *Barr, Nelson, & Barr.*
Solicitors for respondent: *Whyte, Collison, & Pritchard.*

April 11.

[IN THE COURT OF APPEAL.]

THE DUKE OF DEVONSHIRE *v.* THE BARROW HÆMATITE STEEL COMPANY.

Poor-Rate—Iron Mines—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *ss.* 3, 8, 10—"*Specific Contract*" *to pay Rate.*

A covenant, in a lease of iron mines, to pay a certain rent "free of all rates, taxes, and deductions whatsoever, parliamentary, parochial, or of any other nature," is not a "specific contract to pay the poor-rate, in the event of the abolition of the exemption," of iron mines, within s. 8 of the Rating Act, 1874 (37 & 38 Vict. c. 54); and the lessee is therefore entitled under that section to deduct half the poor-rate from the rent.

SPECIAL CASE, stated, by consent, without pleadings.

By an indenture of lease, dated the 17th of June, 1864, the plaintiff granted to H. W. Schneider and R. Hannay licence and authority to get and raise all iron ore that might be found in and under certain lands in the parish of Dalton-in-Furness, in Lancashire. The lease was for the term of thirty-one years from the 1st of January, 1864, determinable as therein mentioned.

The reservation of rent was: "Yielding, paying, and delivering unto the said duke, his heirs and assigns, during the said term the annual rent of 500*l.*, by equal half-yearly payments on the 1st day of July and the 1st day of January in each year; and also at the same periods the royalty of 1*s.* 4½*d.* per ton for every ton of 2240 lbs.

of iron ore which in any half-year shall be dug, raised, and taken out of the said premises over and above 3636 tons; and also at the same periods the royalty of $1\frac{1}{2}d.$ per ton for every ton of 2240 lbs. of limestone, which in any half-year shall be dug, raised, and taken out of the said premises, such rent and royalties to be free and clear of and from all rates, taxes, tithe rent-charges, expenses, and deductions whatsoever, parliamentary, parochial, or of any other nature."

The covenant for the payment of rent was, that the lessees, "their executors and administrators, shall and will from time to time and at all times during the said term pay the said rent and royalties hereby reserved at the times and in the manner herein mentioned."

The lease was assigned to and was vested in the defendants.

A sum of 18,824*l.* 14*s.* 5*d.* was due from the defendants to the plaintiff in respect of rent and royalties on iron ore.

After the passing of the Rating Act, 1874 (37 & 38 Vict. c. 54), the defendants became liable to pay and paid for poor and local rates, imposed upon them as lessees in respect of the iron ore worked by them under the lease, certain sums making in the whole 3024*l.*, the value of the iron ore raised by the defendants being for the purposes of their assessment taken at 2*s.* 3*d.* per ton. The defendants deducted from the 18,824*l.* 14*s.* 5*d.* the sum of 1098*l.*, being the sum which one-half of the local and poor-rates paid by the defendants amounted to, calculated upon the royalties payable to the plaintiff.

The question for the opinion of the Court was, whether the defendants were entitled to deduct the sum of 1098*l.*

Nov. 17, 1876. *J. Kay, Q.C.* (*C. Bowen* with him), for the plaintiff, contended that by the reservation of rent and the covenant to pay the same the lessees had specifically contracted, within the meaning of s. 8 of the Rating Act, 1874 (1), to pay the rates

(1) By 43 Eliz. c. 2, no other mines than coal mines were rateable to the relief of the poor: see *Morgan* v. *Crawshay*, Law Rep. 5 H. L. 304.

By the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3: after reciting the Act of Elizabeth, enacts "that from and after the commencement of this Act the Poor Rate Acts shall extend to the following hereditaments in like manner as if they were mentioned in the recited Act of the forty-third year of the reign

1877

DUKE OF DEVONSHIRE v. BARROW STEEL CO.

imposed pursuant to that statute, and that the defendants were not entitled to deduct the sum of 1098*l.* He argued that the terms of the reservation clearly shewed an intention that, if the mines demised should become rateable, the lessees or their assignees should bear the whole of the burden.

A. Wills, Q.C. (*Edwyn Jones* with him), for the defendants, was not called upon.

COCKBURN, C.J. To my mind this case is free from doubt. The counsel for the plaintiff has relied upon the words of the reservation, which provides that the rent and royalties shall be paid "free and clear of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature." I agree that this clause, taken by itself, would have been quite sufficient to entitle the lessor to the payment of the rent and royalties in full, free from any deduction in respect of rates and taxes such as are therein enumerated, whether present or future; but we must look at it with reference to the provisions of the Rating Act, 1874. That statute takes away the exemption from rating, which mines other than coal mines formerly enjoyed; nevertheless, the 8th section provides for mining leases which were in existence when the statute was passed, and enacts that as a general rule the lessee may deduct from the rent, royalties, or dues payable by him one half of any rate imposed upon him; but the exception is introduced, that where the lessee has specifically contracted to pay the rates in the event of the abolition of the ex-

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of Queen Elizabeth, that is to say, . . . (3) To mines of every kind not mentioned in the recited Act."

Sect. 8: "Where any poor or other local rate, which at the commencement of this Act any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or re-adjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one-half of any such rate paid by him: . . .

Sect. 10: "After the commencement of this Act the hereditaments to which the Poor Rate Acts are extended by this Act, and which are thus made rateable to the relief of the poor, shall be rateable to all local rates in like manner as if the Poor Rate Acts had always extended to such hereditaments."

emption, the contract between him and the lessor shall hold good. In my opinion, we must give due effect to the words "specifically contracted;" and I understand the meaning of the 8th section to be, that where the contract existing at the time of the passing of the Act is general only, that is, where the tenant is liable to all rates and taxes, and is to pay to the lessor a certain rent or royalty, he is to be at liberty to deduct one half of the rates imposed upon him by virtue of the statute; but that if the parties to the lease have in direct terms provided for the contingency of the legislature taking away the exemption, the lessee shall be liable to pay the whole of the rent and royalty as he did before the statute was passed. I think that in order to exempt the lessor from the deduction of one half the rate, the contract of demise must contain some specific reference to the possible abolition of the exemption by Parliament, and that where no such reference is inserted, and the language is general, as in the lease before us, it cannot be said that a specific contract exists within the meaning of the 8th section. It is possible that this construction may operate contrary to the intention of the parties, but the legislature has chosen to engraft upon existing contracts of demise a very plain enactment, and to this enactment we must give its proper effect.

LUSH, J. I am entirely of the same opinion. The 8th section of the Rating Act, 1874, has imposed upon the landlord the obligation of paying one-half the rates, and allows the tenant to deduct it from the rent or royalty, unless the landlord and tenant have in specific terms anticipated the possible abolition of the exemption from rating, and have contracted that in that event the tenant shall pay the whole of the rates to be imposed under the provisions of the Act.

Judgment for the defendants.

The plaintiff appealed.

April 12, 1877. *C. Bowen*, for the plaintiff.

A. Wills, Q.C., and *Edwyn Jones*, for the defendants, were not heard.

LORD COLERIDGE, C.J. This is a very clear case. The judgment

1877

DUKE OF DEVONSHIRE v. BARROW STEEL CO.

of the Queen's Bench Division was perfectly correct. And I shall only add that I would adopt the Lord Chief Justice's judgment as my own.

BRAMWELL and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for both parties: *Currey, Holland, & Currey.*

April 18.

[IN THE COURT OF APPEAL.]

HUDSON *v.* TABOR.

Sea-wall, Liability of Frontagers to repair—Prescription.

12 Ch D 216-7
219 220-1
223, 232-3
14 Ch D 60
65

The plaintiff was the occupier of land and the defendant the owner of adjoining land, both fronting to a creek communicating with the sea. It was necessary for the protection of his land that each person having land fronting the creek should maintain a sea-wall to keep out the high tides, and such sea-wall had been maintained along the creek time out of mind. The plaintiff's wall was continuous with the defendant's, and the level of the defendant's land was higher than that of the plaintiff's. It became necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height; the defendant had neglected so to top his wall, and owing to an extraordinary high tide, the water flowed over his wall, and so from the defendant's land on to the plaintiff's land, doing considerable damage:—

Held, affirming the judgment of the Queen's Bench Division, first, that the mere fact that each frontager had always maintained the wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbour's land, was no sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall for the protection of the adjoining landowners:

Secondly, that by the common law, apart from prescription, no such liability was cast on the defendant, as a frontager.

APPEAL by the plaintiff from a judgment of the Queen's Bench Division in favour of the defendant. (1)

The facts are fully set out in the report in the Court below, and are sufficiently stated in the judgment of the Court of Appeal and in the head-note.

(1) 1 Q. B. D. 225.

1876. Nov. 7, 8. *Thesiger, Q.C.*, and *F. M. White*, for the plaintiff.

Philbrick, Q.C., and *H. C. Bennett* (with them *Day, Q.C.*), for the defendant.

The arguments and cases cited were the same as in the Court below.

In addition were cited for the plaintiff, the judgment of Lord Romilly, M.R., in *Morland* v. *Cook* (1), *Barber* v. *Whiteley* (2), and *Earl of Devonshire* v. *Gibbons* (3); statutes 23 Hen. 8, c. 5, and 3 & 4 Wm. 4, c. 22, ss. 15, 46.

For the defendant: Chitty on Prerogative, p. 173; Hale de Jur. Mar. Harg. Tr. p. 8.

LORD COLERIDGE, C.J., referred to passages in the judgments in *Rex* v. *Commissioners of Pagham Level.* (4)

Cur. adv. vult.

1877. April 18. The judgment of the Court (Lord Coleridge, C.J., Mellish, Brett, and Amphlett, L. JJ.) was delivered by

LORD COLERIDGE, C.J. In this case the plaintiff was the occupier and the defendant the owner of lands in Essex adjoining each other, and fronting a tidal estuary. Along the front of these lands, and for a long way on either side of them, a sea-wall has been maintained, time out of mind, to keep back the sea water from overflowing the lands inside the wall; which lands but for the wall would at each high tide have been overflowed. The wall from various causes gets lower from time to time; and it has been usual for each frontager, according as necessity dictates, to raise, or, as it is called, to "top" his wall, in order to keep out the tide. There was an unusually high tide on the 20th of March, 1874. The defendant had neglected to top his wall, and in consequence of his neglect the sea flowed over his wall and did much damage to the plaintiff's lands which were contiguous, as well as to the defendant's own. The action was brought to recover compensation for this damage, and the question is whether there was any obligation on the defendant as between him and the plaintiff to

(1) Law Rep. 6 Eq. at p. 267.
(2) 34 L. J. (Q.B.) 212.
(3) Hard. 169.
(4) 8 B. & C. 355.

1877

HUDSON v. TABOR.

maintain this wall. The Court below thought that there was not; and we are of that opinion.

In this case, in the absence of any evidence oral or documentary, beyond the fact that each frontager had been accustomed to repair and top the sea-wall in front of his own land, it was possible to suggest two modes only by which the alleged obligation to repair for the benefit of the plaintiff could be imposed upon the defendant,—prescription and common law. By prescription, no doubt, it might be imposed, if there were any evidence of the prescription. *Keighley's Case* (1), and the language of Lord Tenterden in *Rex* v. *Commissioners of Sewers for Essex* (2), are distinct authorities for this proposition. But prescription is matter of evidence, and one of the questions in this case is whether there was any evidence to establish the prescription. The only evidence was that the defendant and his predecessors had been used to repair that portion of the wall which defended his land from the sea, that the other frontagers along the wall had done the same thing, and that no one had ever, by side fences or otherwise, protected his land from the possible damage which would arise if his neighbour neglected to keep his special portion of the sea-wall in repair. But this, which is the whole, is not enough. The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not per se, although a man's neighbour may in fact benefit by such repair, impose on a man the duty of continuing such repair for his neighbour's benefit, when he ceases to care to do it for his own. In this case the non-construction by the respective frontagers of any side defences is not, as the Court below has pointed out, any further evidence of the liability which it is sought to impose. Each frontager had a direct interest in keeping up his frontage wall to protect his own land, and each frontager may well have relied upon the practical protection afforded him by the manifest self interest of his neighbours all along the line to protect themselves.

It is not to be denied that expressions are attributed to Lord Tenterden in *Rex* v. *Commissioners of Sewers for Essex* (2) from

(1) 10 Co. Rep. 139 a. (2) 1 B. & C. 477.

which it might be argued that he thought that mere usage to repair, without more, would impose the liability to repair for the benefit of others. But the evidence in the case, which was on affidavit, is very shortly stated, and it was not one between individual frontagers, but between a frontager and the commissioners of sewers, who had inflicted upon him the whole expense of repairing his own wall, by his default in repairing which great damage to a whole level had been occasioned. Nor, inasmuch as the affidavits were held to establish the prescriptive liability of the frontager in point of fact, does the case really in any manner conflict with our decision in the case before us.

Next, in the absence of any evidence of presumption, is there such a liability as is contended for imposed upon a frontager at common law? It would lead to manifest hardships if it could be. "Suppose the case," says Mr. Scarlett, arguendo, in *Rex.* v. *Commissioners of Sewers for Essex* (1), "of 1000 acres of land all preserved by the same wall; the owners of 500 acres may have only five yards of wall, whilst the owner of a much smaller portion may have 1000 yards; that may be washed down, the whole of his estate may be destroyed, and yet he may be compelled to repair the wall for the benefit of others." It must be admitted that such a consequence might not improbably follow, but there is no sufficient authority to warrant us in saying that in point of law it does follow.

We entirely assent to the criticism of the Court below upon the cases from the Year Book, 18 Edw. 3, f. 23, and the Liber Assizorum, 37 Edw. 3, pl. 10, and in 8 Hen. 7, f. 5, and upon the passage in Callis (p. 115), where these authorities are cited. (2) The learning, as to the right and duty of the Crown to protect the realm from waste of the sea before the time of Henry VI., and since his time to exercise this prerogative by means of commissioners of sewers, seems to us to point in the same direction. It is said that it was the duty of the king to guard and protect the shores and lands adjoining the sea from being overflowed by the sea; but although expressions are used, as, for example, by Lord Wynford in *Henly* v. *Mayor of Lyme* (3), from which it might

(1) 1 B. & C. at p. 482. (2) See 1 Q. B. D. at pp. 231–3.
(3) 5 Bing. at p. 109.

1877

HUDSON v. TABOR.

seem that this was supposed to be a liability to be enforced against the king, such cannot be the meaning of them, and no mode of enforcing it has been, or can be, suggested. But the king has probably from the very earliest times had a right, as part of the prerogative, to defend the realm against waste of the sea, and to order the construction of defences at the expense generally of those who are to be benefited by them. The various statutes of sewers, beginning with the statute of 6 Hen. 6, c. 5, do but regulate the exercise of the prerogative in this respect, and prescribe the forms of commissions for the ordering and execution of the necessary works, which forms have from time to time been varied. In early times probably the king ordered the construction of such sea-walls as he judged necessary, very much according to his own discretion. In process of time, however, this discretion came to be limited by established rules, and at last by statute; but prior to any statute, it is laid down by Fitzherbert, De Nat. Brev. 225 E., and assented to by Lord Coke in the case of *The Isle of Ely* (1), that before the king granted his licence to repair a trench coming from the sea, or make a new one, there should be a writ of ad quod damnum, "to inquire what damage it will be to the king or others;" and without a proper return to such a writ, such works, as we understand Lord Coke, could not be done. The writ of ad quod damnum, though probably a common law writ, is not, as stated by Reeve, vol. ii., p. 230, to be found mentioned before the time of Edward I.; and is most commonly to be found employed in reference to the king's licence to aliene in mortmain; but it appears to have been very early applied to other subjects, and amongst them to the making of rivers and the making and repair of defences against the sea. And the whole of this procedure is entirely inconsistent with the notion that at common law the frontager could be compelled by action to repair any part of such defences which had been injured "by the outrageousness of the sea." The same observation applies, and with increased force, to the whole machinery which the successive statutes of sewers have provided since the time of Henry VI.

As to the origin of the sea-wall in this case, in point of fact, general history and county history are alike silent. But in all

(1) 10 Co. Rep. at p. 143 a.

likelihood it was first erected either by the king at the expense of those to be benefited by it, assessed upon them respectively in proportion to the benefit they did or would respectively receive, or by some great landowner for his own benefit, whose land, if it came into the hands of separate owners, would be liable to no other burdens than those which the law imposes upon all other land within the realm. But, as we have said, we can see no reason for holding that the burden sought to be imposed upon the defendant in this case in respect of his frontage land is one of such burdens, and we are of opinion that the judgment in his favour given by the Court below should be affirmed.

Judgment affirmed.

Solicitor for plaintiff: *J. Hudson.*

Solicitors for defendant: *Beaumont & Warren.*

[IN THE COURT OF APPEAL.]

April 11.

ROBINSON *v.* PRICE AND OTHERS.

Ship and Shipping—General Average—Imminent Risk—Auxiliary Steam Pumping Power—Spars and Cargo burnt as Fuel.

A ship sailed well equipped and manned for the voyage, having a donkey-engine on board and a reasonable supply of coals to work it for pumping purposes. The ship met with very heavy weather and sprang a leak, and in order to keep her afloat, it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo:—

Held, that the sacrifice of the spars and cargo was general average.

APPEAL by the defendants from the decision of the Queen's Bench Division, ante, p. 91.

French, for the defendants, contended that the additional statement of the arbitrator (at the bottom of p. 95) ought not to have been made without taking fresh evidence, citing *Nickalls* v. *Warren*. (1)

[LORD COLERIDGE, C.J. This is nothing more than what is constantly done; if the arbitrator happens to be present, the Court

(1) 6 Q. B. 615.

1877

ROBINSON v. PRICE.

asks for an explanation of a statement which does not appear sufficiently explicit.]

He then contended that the additional statement was inconsistent with par. 6, and that the facts did not shew any such imminent peril as to make the burning of the spars and cargo general average. The shipowners were bound to have sufficient coals on board to work the donkey-engine. He referred to *Harrison* v. *Bank of Australasia*. (1)

G. Bruce, for the plaintiff, was not heard.

LORD COLERIDGE, C.J. In my opinion the judgment of the Queen's Bench Division was perfectly right. The facts are now stated so distinctly as to preclude all argument. It is impossible to say that under the circumstances this sacrifice of the spars and cargo was not general average.

BRAMWELL and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *H. C. Cook, for Tinley, Adamson, & Adamson, North Shields.*

Solicitors for defendant: *Argles & Rawlins.*

1876
Dec. 2.

[CROWN CASE RESERVED.]

THE QUEEN *v.* LANGTON.

Evidence—Refreshing Memory—Entries checked by Witness at the Time—Joint Stock Company—Evidence of its existence.

The prisoner was a timekeeper, and T. C. was pay clerk, in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time book. At pay time it was the duty of the prisoner to read out from the time book the number of days worked by each workman to T. C., who paid the wages accordingly. And T. C. saw the entries in

(1) Law Rep. 7 Ex. 39.

the time book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences:—

Held, that T. C. might refresh his memory, by referring to the entries in the time book, in order to prove the sums paid by him to workmen.

The prisoner being charged with obtaining by false pretences the moneys of a company:—

Held, that the existence of the company was sufficiently proved by evidence that it had carried on business as such.

CASE reserved by the chairman of the Kirkdale quarter sessions.

The prisoner, Edward Langton, was tried on the 11th of July last, upon an indictment charging him, in the first and second counts, with obtaining by false pretences from Thomas Chitson certain money of the Tawd Vale Colliery Company, Limited, with intent to defraud, and in the third count, with obtaining by false pretences from Samuel Higginbottom certain other money of the said company with intent to defraud.

The prisoner was in the service of the said company as one of their timekeepers. It was his duty to give in to another clerk, fortnightly, a list of the number of the days on which the workmen in the employ of the company had worked during the preceding fortnight. It was the duty of the clerk to enter in the time book these numbers and the amount of the wages due to each workman according to the number of days worked, and from this time book, at the time of paying the workmen's wages, it was the prisoner's duty to read out aloud the number of the days each man had worked, and the wages were then paid to the workman by the pay clerk accordingly. Robert Aspinwall, a workman in the employ of the company, kept a provision shop on his own account, at which the prisoner dealt, and at the time when the prisoner made the false pretences charged in the indictment, he was indebted to the said Robert Aspinwall. The 14th of April last was the day on which the wages earned during the fortnight preceding the 11th of April became payable. During that fortnight Aspinwall had worked twelve days, and no more, and there was due to him in respect of his said work the sum of 2*l.* 11*s.* and no more, his wages, namely, 4*s.* 3*d.* a day. At some time between the said 11th and 14th of April, the prisoner asked Aspinwall how many days he had worked during that fortnight. Aspinwall told

1876

THE QUEEN v. LANGTON.

him, as the fact was, that he had worked twelve days. The prisoner then asked Aspinwall how much money he, the prisoner, owed Aspinwall in respect of provisions bought of him by the prisoner, and on Aspinwall telling him the amount, the prisoner said, "I will put it down to your time." There was no evidence of the time list handed in by the prisoner in respect of that fortnight, but the time book was made up, apparently according to the same course, and in the time book the number of fifteen days and a-half was entered as the time which Aspinwall had worked during that fortnight, and the sum of 3*l.* 5*s.* 10*d.*, being at the rate of 4*s.* 3*d.* per day, for fifteen days and a half day, was entered as the amount of the wages due to him. These entries the prisoner read out aloud at the pay time on the said 14th of April, and the pay clerk, the said Thomas Chitson, then handed to Aspinwall, in the presence of the prisoner, the sum of 3*l.* 5*s.* 10*d.* accordingly.

The 12th day of the following month of May was the day on which the wages earned during the fortnight preceding the 9th of May became payable. During that fortnight, Aspinwall had worked twelve days, and no more, and there was due to him in respect of such work, at the same rate of 4*s.* 3*d.* a day, the sum of 2*l.* 11*s.*, and no more. On the said 9th of May, the prisoner asked Aspinwall what time he had worked during that fortnight, and how much he, the prisoner, owed Aspinwall. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and that the prisoner owed Aspinwall the sum of 18*s.* 6*d.*, which he had paid for the prisoner at his request. The prisoner then said that he would put the said sum of 18*s.* 6*d.* to Aspinwall's time. At the pay time on the said 12th of May the number of days' work entered in the time book to the credit of Aspinwall was sixteen days and a half day, and the sum of 3*l.* 10*s.* 1*d.* was entered as the amount due to him in respect of such work. These entries the prisoner read out aloud at the said pay time, and the said pay clerk then handed to Aspinwall the sum of 3*l.* 10*s.* 1*d.* accordingly.

The 9th day of the following month of June was the day on which the wages earned during the fortnight preceding the 6th of June became payable. During that fortnight Aspinwall had

worked twelve days and no more, and there was due to him, in respect of such work, at the same rate of 4*s.* 3*d.* a day, the sum of 2*l.* 11*s.*, and no more. On the said 6th of June the prisoner asked Aspinwall what time he had worked during that fortnight, and what the prisoner owed Aspinwall for provisions. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and the amount which the prisoner owed Aspinwall for provisions, upon which the prisoner said to Aspinwall that he, the prisoner, would put down to Aspinwall's time the amount so owing by the prisoner to Aspinwall.

On the 6th and 9th day of June, Samuel Higginbottom, the secretary of the said company, was acting as and for the pay clerk, and made up the time book for the wages which became payable on the said 9th of June. And to him the prisoner gave in the number of fourteen days and three quarters of a day as the time which Aspinwall had worked during the said fortnight. The time book was then made up by Higginbottom, according to the usual practice, and on the said 9th of June the prisoner at the pay time read out from the said time book fourteen days and three quarters of a day as Aspinwall's time, and 3*l.* 2*s.* 8*d.* as the sum owing to Aspinwall in respect of such work.

As to all the charges against the prisoner, Aspinwall proved the sums of money he had received on the said pay days, and the number of the days for which he had been so paid wages, but in respect of the charge mentioned in the first and second counts, Thomas Chitson, the pay clerk, was called as a witness before Aspinwall gave his evidence. The prisoner's counsel objected to Chitson being allowed to refer to the time book, to enable him to say for how many days' work and what amounts of money he had paid Aspinwall, on the 14th day of April and 12th day of May. The counsel contended that as Chitson had not made the entries in the time book, he ought not to be allowed to refer to it to refresh his memory; but as Chitson proved that he had seen those entries whilst the prisoner was reading out aloud at the pay time, and that though at the time of the trial he did not remember the particulars of the entries without referring to the book, yet he knew that at the pay time the prisoner read the entries correctly, and that he Chitson had paid the sums which were mentioned in

1876

THE QUEEN v. LANGTON.

those entries, the Court allowed his evidence to go to the jury reserving the point for the opinion of this Court.

As to all the counts the prisoner's counsel contended that it was necessary, in support of the indictment, to prove that the Tawd Vale Colliery Company, Limited, was an incorporated company, that this could not be proved by parol evidence only, and that as there was only the parol evidence of witnesses who swore that the company was incorporated, the Court ought to direct an acquittal of the prisoner.

To this the counsel for the prosecution replied that as, by virtue of s. 88 of the statute 24 & 25 Vict. c. 96, the indictment would be sufficient without alleging any ownership of the money, and as the references to the company might have been omitted without vitiating the indictment, the allegations as to the company might therefore be rejected as surplusage. The Court declined to direct an acquittal, and left the evidence to the jury accordingly, but reserved a case on this point also for the opinion of this Court.

The jury found the prisoner guilty.

The Court sentenced him to twelve months imprisonment with hard labour, subject to the opinion of this Court, as to whether the Court was right in over-ruling the objections raised on behalf of the prisoner by his counsel.

No counsel appeared.

COCKBURN, C.J. With regard to the first point, the propriety of allowing the witness to refresh his memory by means of the time book, I think he was rightly allowed to do so. If the witness had only seen the entries in the absence of the prisoner, the case might be different. There would then be obvious dangers in admitting such a use of the book, which do not exist in the present case. Here the entries were read aloud by the prisoner himself, and seen by the witness at the time of reading, and he made payments in accordance with them.

As to the other point it was enough to shew that the company carried on business as such.

LORD COLERIDGE, C.J., CLEASBY, B., POLLOCK, B., and FIELD, J., concurred.

Conviction affirmed.

[CROWN CASE RESERVED.]

1877
Feb. 3.

THE QUEEN *v.* FOSTER.

False Pretences—Sale of Goods—Commendation—Misstatement of nature of Goods.

On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer from Leicester, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted:—

Held, that the conviction was right.

CASE stated by the deputy chairman of the Leicester quarter sessions.

James William Foster was tried on the 2nd day of January, 1877, for obtaining money by means of false pretences from Elizabeth Beckworth, the wife of William Bernard Beckworth.

The indictment contained several counts; but as all these, except the first, were withdrawn, it is sufficient to set out that count only. It stated, "That James William Foster, on the 17th day of November, 1876, at the township of Hugglescote, in the county of Leicester, unlawfully, knowingly, and designedly did falsely pretend to one, Elizabeth Beckworth, that he was a tradesman in the tea trade in Leicester, that he had good tea for sale, and did then and there offer for sale, and did sell to the said Elizabeth Beckworth sixteen paper packages which he, the said James William Foster, did falsely pretend were each and every of them composed of good tea, by means of which said false pretences the said James William Foster did then unlawfully obtain from the said Elizabeth Beckworth 1*l.* 16*s.* in money, the money of William Bernard Beckworth, her husband, with intent to defraud; whereas, in truth, and in fact, the said James William Foster was not a tradesman in the tea trade in Leicester; and the said sixteen packages were not each or any of them composed of good tea, but each and every of

1877

THE QUEEN v. FOSTER.

the said packages contained a mixture composed of tea, sand, quartz, and magnetic oxide of iron, which said mixture is unfit for food, and injurious to health, as he the said James William Foster well knew at the time when he did falsely pretend as aforesaid."

It appeared in evidence as follows:—The prisoner is a hawker, residing at West Bromwich, in the county of Stafford. On the 17th day of November, 1876, he called on the wife of the prosecutor, who is a licensed victualler at Hugglescote, in the county of Leicester, and representing himself to be a tea-dealer residing at Leicester, offered to the said Elizabeth Beckworth tea for sale which he said was good tea. He had with him sixteen packages, which appeared to be each 1 lb. packages of tea. He produced a sample of tea, which appeared to be good tea, and he then opened one of the packages taking out of it a quantity, and stating to Mrs. Beckworth, "You see it's like that I shewed you." Mrs. Beckworth eventually bought the whole quantity for 1*l.* 16*s.*, that is at the rate of 2*s.* 3*d.* per lb., in the belief that it was good tea as represented by the prisoner. When the prisoner had left, Mrs. Beckworth opened the packages, and found that instead of tea they contained a mixture of sand and other stuff unfit to drink. Mrs. Beckworth communicated with the police, and the mixture was submitted to Dr. Emmerson, the analyst of the county of Leicester, who found that the mixture was composed of tea, sand, quartz, and oxide of iron, and unfit for food or drink. A week after the sale the prisoner called again at the house of the prosecutor, and being remonstrated with, declared that the substance was tea, and what Mrs. Beckworth took for sand was tea-dust. He offered, however, 2 lbs. of good tea to make it up, which the prosecutor refused to receive. The prisoner was arrested on a warrant, and while in custody had an interview with the police constable in his cell, to whom he stated that he knew he had done wrong, and that if he got out of this job he would lead a different life.

At the trial, Dr. Emmerson, the county analyst, was called as a witness. He deposed that the mixture only contained 25 per cent., or one quarter in weight of tea, that the rest was sand, quartz, earth, and oxide of iron, unfit to drink and injurious to health. He also stated on examination that he believed that the adulteration had taken place in China, and that the mixture was known in

the trade as lie tea. On this the learned counsel for the prisoner appealed to the chairman to stop the case; this, however, he declined to do, and the following witness was called for the defence:—

Mr. Simmonds stated that he was a wholesale tea-dealer at Birmingham, and had sold the packages in question to the prisoner. He also stated that he had purchased the mixture from the bonded warehouses in London, had paid 1*s.* 2*d.* per pound for it, and had sold it to the prisoner at 1*s.* 4*d.* per pound, and that in his belief the packages, as produced in court, were the same as those made up in his shop and sold to the prisoner. That he should call the mixture tea, though not good tea, and though he should not drink it himself, as he could get better, he was not prepared to hear that it was injurious to health. He also said that he did not think that a hawker of tea, not being a scientific analyst, could have discovered the deleterious ingredients mixed with it, as the county analyst had done.

On this the chairman charged the jury that if the case were one of simple commendation or praise of an article, and an exaggeration of its quality only, it was not a case under which the prisoner could be convicted, and that before they convicted the prisoner they must be satisfied that he knew what the real nature of the packages was; that it was not tea, but a mixture of articles unfit for drink, and that, knowing the nature of the mixture, he designedly falsely pretended to the prosecutor's wife that it was "good tea" with intent to defraud. That the question was between simple exaggeration and misrepresentation of a fact specific to the contract with intention to defraud.

The jury retired to consider their verdict, and found the prisoner guilty, and the chairman sentenced him to six calendar months imprisonment with hard labour.

The question for the Court to consider was, whether the chairman was right in his direction to the jury, or whether he should have directed them that there was no offence at law on the case as proved.

Sills, for the prisoner. The statements of the prisoner amounted to mere commendation of his wares as good when they were not

1877

THE QUEEN v. FOSTER.

good. The jury were not asked to find, and did not find, whether the article was or was not tea: *Reg.* v. *Kerrigan* (1); *Reg.* v. *Ball* (2); *Reg.* v. *Roebuck* (3); *Reg.* v. *Eagleton* (4); *Reg.* v. *Ardley* (5); *Reg.* v. *Leigh* (6); *Reg.* v. *Pratt* (7); *Reg.* v. *Bryan.* (8)

Jacques, for the prosecution, was not called upon.

KELLY, C.B. There is no room for doubt upon this case. The prisoner sold as good tea packages containing what was not tea at all, but three-fourths of it a deleterious mixture. To call tea good when it was not good might be mere commendation, and not the subject of a criminal prosecution. Here the question was properly left to the jury. They were told that they must be satisfied that the prisoner "knew what the real nature of the packages was, that it was not tea, but a mixture of articles unfit for drink, and that, knowing the nature of the mixture, he designedly falsely pretended that it was good tea with intent to defraud." And the evidence amply supported the finding of the jury. The prisoner's guilty knowledge is shewn by his statement to the police constable.

MELLOR, DENMAN, and FIELD, JJ., and HUDDLESTON, B., concurred.

Conviction affirmed.

Solicitors for prosecution: *Austen, De Gex, & Harding, for W. N. Reeve, Leicester.*

Solicitor for prisoner: *W. Rogers, for W. H. Powell, Birmingham.*

(1) 1 L. & C. Cr. C. 383; 33 L. J. (M.C.) 71.
(2) Car. & M. 249.
(3) Dears. & B. Cr. C. 515; 25 L. J. (M.C.) 101. 2 Jur NS 597
(4) Dears. Cr. C. 515; 24 L. J. (M.C.) 158. 1 Jur NS. 940
(5) Law Rep. 1 C. C. 301.
(6) 8 Cox, Cr. C. 233.
(7) 8 Cox, Cr. C. 334.
(8) Dears. & B. Cr. C. 265; 26 L. J. (M.C.) 84. 3 Jur NS 620

[CROWN CASE RESERVED.]

1877
Feb. 10.

THE QUEEN *v.* DEANE.

False Pretences—Previous Conviction of Felony—Indictment—Penal Servitude—Sentence.

A prisoner convicted of obtaining money by false pretences, after a previous conviction for felony (the previous conviction being charged in the indictment), cannot be sentenced to penal servitude for a less term than seven years.

CASE reserved by the chairman of the Kirkdale quarter sessions.

On the 17th of January, 1877, Mary Jane Patterson Deane pleaded guilty to an indictment charging her with obtaining money by false pretences. She also pleaded guilty to a previous conviction of felony (after another previous conviction of felony) charged in the same indictment. The chairman sentenced her to seven years penal servitude.

By s. 88 of the Act 24 & 25 Vict. c. 96, the misdemeanour of obtaining money by false pretences is punishable by penal servitude for three years.

Sect. 7 of the same Act provides for the punishment of larceny after a previous conviction of felony.

Sect. 8 provides for the punishment of larceny after a previous conviction of an indictable misdemeanour.

But there is no express provision in the Act for the punishment of an indictable misdemeanour after a previous conviction of felony.

Sect. 116 of the same Act, however, which contains provisions for the form in which previous convictions are to be charged, is in these words: "In any indictment for any offence punishable under this Act after a previous conviction for any felony, misdemeanour, or offence, it shall be sufficient," &c. It is therefore clear that in this section the insertion of a charge of a previous conviction for felony on an indictment for misdemeanour is contemplated. Whether the words are sufficient to make such an insertion legal, is a question for the consideration of the Court.

1877

THE QUEEN v. DEANE.

By 27 & 28 Vict. c. 47, s. 2, it is provided that no sentence of penal servitude shall be for less than five years, and that "where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude than can be awarded shall be seven years."

By 34 & 35 Vict. c. 112, ss. 8 and 9, it is provided that where there has been a previous conviction of a crime police supervision may be added to the sentence, and reference for the form of charging the previous conviction is made to s. 116 of the Act of 24 & 25 Vict. c. 96, above quoted.

Under these last-mentioned sections, therefore, there is express power to charge a previous conviction for felony in an indictment for misdemeanour, but only for the purpose of sentencing to police supervision.

In the case of *Reg.* v. *Summers* (1) it was held that a sentence of penal servitude for five years, on a conviction for a misdemeanour, was right, a previous felony, though proved, not having been charged in the indictment. It will be observed, however, that in the case stated it is assumed that, in an indictment for a misdemeanour under the Larceny Act, a previous conviction of felony could be charged. In the case of *Reg.* v. *Willis* (2) the case of *Reg.* v. *Summers* (1) was followed.

The question for the opinion of the Court was whether the sentence of seven years penal servitude was right, and if not, what sentence should be substituted.

No counsel appeared.

KELLY, C.B. The sentence of seven years penal servitude is right, by the express terms of 27 & 28 Vict. c. 47, s. 2. By that section, "where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be seven years." When, therefore, a prisoner is convicted upon a charge of false pretences, and also of a previous conviction of felony, duly charged in the indict-

(1) Law Rep. 1 C. C. 182. (2) Law Rep. 1 C. C. 363.

ment, he cannot be sentenced to a less term of penal servitude than seven years.

1877

THE QUEEN v. DEANE.

MELLOR, LUSH, and DENMAN, JJ., and HUDDLESTON, B., concurred.

Conviction affirmed. (1)

[CROWN CASE RESERVED.]

Feb. 10.

THE QUEEN *v.* KENNY.

Larceny—Receiving—Husband and Wife—Adultery.

A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods.

Reg. v. *Deer* (L. & C. Cr. C. 240; 32 L. J. (M.C.) 33) and *Reg.* v. *Featherstone* (Dears. Cr. C. 369; 23 L. J. (M.C.) 127) explained.

CASE reserved by the recorder of Chester.

William Edward Kenny was tried upon an indictment, which charged him, in the first count, with stealing, on the 26th of August, 1876, certain money to the amount of 143*l.*, one purse, one silver watch, one child's cloak, one scarf, one American box, one Prayer Book, two money bags, and other articles of the moneys, goods, and chattels of Edward Gurn; and in the second count, with feloniously receiving, on the day and year aforesaid, the moneys, goods, and chattels aforesaid, well knowing the same to have been feloniously stolen.

The following was the evidence:—

Edward Gurn: I am an innkeeper at Burslem. On the 23rd of June, 1876, my wife left my house without my knowledge or consent. The same night I missed 143 sovereigns. The money was in a bag. This bag (produced) is it. There was another bag without money in it. This (produced) is it. This watch (produced) is mine. My wife wore it sometimes. I gave her no permission to take it or any of the things. This Prayer Book (produced) is

(1) See *Reg.* v. *Garland*, Ir. Rep. 3 C. L. 383; 11 Cox, Cr. C. 224.

(2) 8 Jur. N.S. 1216 (3) 18 Jur. 538

1877

THE QUEEN v. KENNY.

mine. These three sheets (produced) I believe to be mine; four were missing after my wife left. This bed-cover, baby's cloak, scarf, and this American box (all produced) are mine. The money I saw safe on the morning of the 23rd of June. I was saving it to buy horses in Ireland. Three days after my wife left I saw the prisoner. He came to my house. A week after that he came again, and asked me how much money my wife took. I told him 15*l.* or 20*l.* I told him that, because I wanted some information from him. I accused him of being out car-driving with my wife on the Sunday before. He denied it. The prisoner left the neighbourhood shortly after, and I never heard of him or my wife till October, when I went to Ireland with a police officer. I found them together at Belfast. They were in a back room, packing a box. The prisoner was packing it. It was my American box. I saw some of the contents of the box. My Prayer Book was in it and the child's cloak. The bed-cover was in the prisoner's box. I saw the prisoner searched. He was wearing my watch.

Cross-examined: I sometimes wore the watch, so did my wife. I had another. I wore both as I liked. My wife deposited over 100*l.* with a Mr. Jackson at Cheadle, eighteen months before. She did not do that when I had a woman named Sherlock in the house. Nothing of the sort took place. My wife was in court at Tunstal. She did not give evidence. The gold was locked up in a drawer. I had the key in my pocket, and she must have got another.

Re-examined: She took the 100*l.* to Jackson against my will. It was my money. I wrote to him for it, and he sent me a cheque, which I cashed, and this was part of the 143*l.*

John Dodd: I am a sergeant, Staffordshire police. The prisoner was in that force until the 24th of July last stationed at Burslem. He had not much money. His wages were 22*s.* per week. I heard of him borrowing from his comrades. He was a single man. I went with prosecutor to Belfast in October. We found the prisoner and the prosecutor's wife there together. He was wearing this watch (produced); I found on him, in these two bags (produced) 98*l.* 14*s.* 8*d.*

Cross-examined: There were four Irish 1*l.* notes in the money.

The bags were in his pockets. All the other things (except the watch) were in the boxes, and in the rooms occupied by the prisoner and Mrs. Gurn.

Re-examined: The prisoner was packing the box in which I found the bed-cover.

Harriet Upton: (Evidence of inability to travel arising from illness, having been duly given, the deposition of this witness before the magistrates was read as follows):—

I am a single woman, and live at 10, Paradise Row, Chester. I know the prisoner. I recollect him coming to my house early in the month of August last. It would be about one in the morning. Previously to his coming a lady had been lodging in my house about six weeks. She gave me the name of Mrs. Burslem. The photograph now produced is the photograph of the lady. Mrs. Burslem opened the door for the prisoner when he came. They occupied the same bedroom that night, and left at ten o'clock the night following. I see the American box produced. The prisoner assisted in moving the box downstairs and from the house. Since the prisoner and Mrs. Burslem left I have had a letter asking me to visit them. It came from Belfast. There was only one bed in that room.

Edward Gurn, the prosecutor, recalled. The photograph now produced to me is the photograph of my wife.

Upon this evidence the counsel for the prosecution relied on the second count of the indictment, and contended on the authority of the cases of *Reg.* v. *Deer* (1), and *Reg.* v. *Featherstone* (2), that the wife by adultery with the prisoner in August at Chester, "determined her quality of wife," and in then converting her husband's goods to her own use she was guilty of larceny, and that the prisoner consequently could be guilty of receiving.

The prisoner's counsel argued that a wife cannot be guilty of larceny of her husband's goods, and that there is no decided cases to that effect, the case of *Reg.* v. *Deer* (1) being open to the inference that the receiving was from some person other than the wife. And he further contended that there was no sufficient distinct possession of the property by the prisoner (at all events in

(1) L. & C. Cr. C. 240; 32 L. J. (M.C.) 33. 8 Jur. N.S. 1216

(2) Dears. Cr. C. 369; 23 L. J. (M.C.) 127. 18 Jur. 538

1877

THE QUEEN v. KENNY.

the city of Chester and within the jurisdiction of this Court of quarter sessions) to render the prisoner liable to conviction as a receiver. He cited *Reg.* v. *Rosenberg* (1) and *Reg.* v. *Prince.* (2)

Having regard to the statute 24 & 25 Vict. c. 96, s. 96, which renders a receiver liable to be indicted whenever the principal felon might be indicted, the learned recorder left the case to the jury, adopting the view taken by the counsel for the prosecution.

Under these circumstances the jury found the prisoner guilty of felonious receiving, and the learned recorder postponed the sentence until the opinion of the Court for the consideration of Crown Cases Reserved could be taken.

The learned recorder referred the Court to the cases enumerated in the note to the case of *Reg.* v. *Mutters* (3), and requested the opinion of the Court as to whether the conviction was right.

Marshall, for the prisoner. A wife cannot steal her husband's goods, and, therefore, no one receiving them from her can be guilty of receiving. (He was stopped by the Court.)

Rose, for the prosecution. Adultery determines the wife's quality as such with reference to the husband's goods. Her dealing with them after such adultery, if the other necessary ingredients of larceny be present, is stealing, and the adulterer who receives them from her may be guilty of receiving. *Reg.* v. *Deer* (4) and *Reg.* v. *Featherstone* (5) are expressly in point.

[DENMAN, J. The Law Journal Report of each of those cases shews the real ground of decision. In the first case the goods were such that the wife could not have been the person to remove the whole of them from her husband's house, and, therefore, the prisoner received them from some one other than the wife. In the other the prisoner was himself a party to the removal, and was guilty not merely of receiving but of stealing.]

KELLY, C.B. This conviction cannot be sustained. Husband

(1) 1 C. & H. 233.
(2) 11 Cox, Cr. C. 193.
(3) L. & C. Cr. C. 511 34 L. J. (M.C.) 54. 11 Jur NS. 144
(4) L. & C. Cr. C. 240; 32 L. J. (M.C.) 33. 8 Jur NS. 1216
(5) Dears. Cr. C. 369; 23 L. J. (M.C.) 127. 18 Jur 538

and wife are one person in law, and the wife cannot steal her husband's goods, whether she has committed adultery or not. There is a class of cases in which the question of adultery is very material. Where the adulterer, acting in concert with the wife, takes the husband's goods, the fact of adultery, if established, by revoking the wife's authority to dispose of her husband's goods, may make that larceny on the part of the adulterer which otherwise would not have been so. But here the prisoner has not been convicted of stealing, and probably the facts would not have supported such a conviction. He has been convicted of receiving, and that conviction cannot be sustained without proof of a stealing by some other person. There is no evidence of any such stealing.

MELLOR, LUSH, and DENMAN, JJ., and HUDDLESTON, B., concurred.

Conviction quashed.

Solicitors for prosecution: *Chester & Co., for E. Tennant, Hanley.*

Solicitor for prisoner: *E. W. Hollingshead, Tunstall.*

[CROWN CASE RESERVED.]

April 21.

THE QUEEN *v.* RICHARDS.

Accessory after the Fact—Murder—Manslaughter—Indictment as accessory to Murder—Conviction as accessory to Manslaughter.

Several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter:—

Held, that those charged as accessories might rightly be convicted as accessories to manslaughter.

CASE stated by Cockburn, C.J.

The prisoners were tried at the last assizes for the county of Somerset on an indictment which, after charging one George Baker and three persons, named George Hutchings the elder, Giles Hutchings, and George Hutchings the younger, with the

1877

THE QUEEN v. RICHARDS.

wilful murder of one Nathaniel Cox, went on to charge the two prisoners George and James Richards with having, well knowing the said George Hutchings the elder, Giles Hutchings, and George Hutchings the younger, to have committed the said murder, afterwards feloniously received, comforted, harboured, assisted, and maintained them.

On the trial the prisoners charged with murder were found guilty of manslaughter. The two Richards were found guilty as accessories after the fact, whereupon it was objected in arrest of judgment, that the prisoners being charged in the indictment as accessories after the fact to murder, could not be found guilty of having been accessories after the fact to manslaughter.

The learned judge was of opinion that as, according to the established law, the offence of manslaughter is involved in that of murder, and a person indicted for murder may be convicted under such an indictment of manslaughter, so a person charged as accessory to murder may be found guilty on such an indictment of having been accessory to manslaughter. But as the point appeared to have never before presented itself for decision, he reserved it for the consideration of this Court and requested their decision upon it.

Cole, Q.C., for the prisoners. The question whether a person indicted as accessory to murder can be convicted as accessory to manslaughter has never been decided. The case of *Goff* v. *Biby* (1) was the case of an appeal of murder, and the principles applicable to an appeal and an indictment are not necessarily the same. The opinion expressed by Tindal, C.J., in *Reg* v. *Greenacre* (2) is a mere dictum. Great practical difficulties might arise if the present conviction be upheld. A man might at one and the same time, and by one and the same act, harbour four persons who had been concerned in a homicide. Two of the principals might be apprehended and tried upon such facts as to warrant only a conviction for manslaughter, and they would accordingly be convicted of manslaughter, and the harbourer as an accessory. Afterwards the other two might be apprehended and charged with murder, and the harbourer be indicted as accessory to murder. He would

(1) Cro. Eliz. 540. (2) 8 C. & P. 35.

then be liable to be convicted a second time of the same offence, that is, as accessory to manslaughter, in respect of the very same act for which he had been already convicted. Yet he could neither plead autrefois acquit nor autrefois convict.

Hooper, for the prosecution, was not called upon.

COCKBURN, C.J. We are all agreed that this conviction should be affirmed. Mr. Cole's difficulty as to pleading is easily answered. One who harbours several felons, though the principals may have committed a joint crime, is guilty of a separate offence for each person whom he harbours. And, therefore, if he were tried with some of the principals and convicted as an accessory in harbouring them, and afterwards were tried with the other principals and charged as an accessory in harbouring them, he would be tried, not a second time for the same offence, but for a different offence.

As to the main point, a man charged with murder may be convicted of manslaughter, because murder involves the lesser charge of felonious homicide; so, for the same reason, one charged as accessory to murder may be convicted as accessory to manslaughter. The one thing follows from the other.

MELLOR, GROVE, LINDLEY, and HAWKINS, JJ., concurred.

Conviction affirmed.

Solicitors for prosecution: *Combe & Wainwright, for R. N. Howard, Weymouth.*

Solicitors for prisoner: *Reed & Cook, Bridgwater.*

1877
April 14.

[IN THE COURT OF APPEAL.]

JONES AND OTHERS *v.* THE VICTORIA GRAVING DOCK COMPANY.

Statute of Frauds, s. 4—*Agreement not to be performed within a Year—Contract contained in several Documents—Identification by Parol of Documents mentioned in Signed Document—Effect of Signature by Chairman of Minute Book of Company pursuant to the Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 67—*Appeal—Reference—Special Case*—17 & 18 *Vict. c.* 125, *ss.* 5, 32.

4 Q B D 423
4 C P D 413
9 Q B D 62

The defendants, a company incorporated under the Companies Act, 1862, entered into negotiations with the plaintiffs to employ them as managers for five years. A draft agreement was prepared and submitted to the plaintiffs; they objected to some of its terms, and thereupon the directors of the defendants' company wrote out a paper modifying the draft agreement in some particulars, but concluding with the words "all other provisions as in draft." The plaintiffs agreed to the draft agreement as modified by this paper. The secretary of the defendants' company entered in the minute book a resolution that the plaintiffs having signified their willingness to undertake "the management of the company's works upon the terms of the draft agreement submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed." At the next meeting of the directors of the defendants' company the chairman signed the above resolution pursuant to the Companies Act, 1862, s. 67:—

Held, in the Queen's Bench Division by Mellor and Lush, JJ., that there was a valid contract within the Statute of Frauds, s. 4, by the defendants to employ the plaintiffs during five years: for the terms of the service were completely ascertained when the plaintiffs assented to the draft agreement as modified by the paper, and it was immaterial that the directors of the defendants' company intended the contract as finally arrived at to be afterwards "engrossed in duplicate, signed, sealed, and executed;" and the draft agreement and the paper modifying it might be identified by parol as the draft agreement referred to in the resolution entered in the minute book; and although the signature of the chairman was affixed to the minute book for the purpose of verifying the accuracy of the entry therein contained, pursuant to the Companies Act, 1862, s. 67, it nevertheless operated as an admission of the contract contained in the draft agreement and the paper, and was sufficient to satisfy the Statute of Frauds, s. 4.

By an order of reference made by consent, and before the coming into operation of the Judicature Acts, it was ordered that neither the plaintiffs nor the defendants should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opinion of the Court upon a special case stated by him. The Court gave judgment for the plaintiffs. The defendants appealed:—

Held, in the Court of Appeal, that no appeal could be brought.

Gumm v. *Fowler* (2 E. & E. 890; 29 L. J. (Q.B.) 189) observed upon.

6 Jur N S 1073,

JONES BROTHERS, the plaintiffs in this case, had brought an

action against the Victoria Graving Dock Company, the defendants, for damages for having been dismissed from their employment.

By an order of Mr. Justice Blackburn, dated the 28th of June, 1875, and expressed to be made by consent, the action was in the usual manner, referred to an arbitrator, one of the clauses (on a printed form) being, "And I further order, by and with such consent as aforesaid, that neither the plaintiffs nor the defendants shall bring or prosecute any action or suit at law or in equity against the said arbitrator, or bring any writ of error, or prefer any bill in equity against each other of and concerning the matters so as aforesaid referred."

The arbitrator, on the 30th of May, 1876, made an award that the plaintiffs were dismissed from the service or employment of the defendants under such circumstances that the plaintiffs would be entitled to damages assessed at 1500*l.*, provided there was a memorandum of a new agreement to satisfy the 4th section of the Statute of Frauds; and stated the following special case:—

1. The firm of Jones Brothers of Liverpool, the plaintiffs in the action, in 1866 entered into an agreement with the defendants to act as managers of their docks in London for a space of eight years, which would terminate on the 1st of January, 1874. Shortly before the expiration of the term of eight years negotiations were commenced between the parties relative to a continuation of their management by the plaintiffs on certain terms as to remuneration and otherwise.

2. Messrs. Gedge, Kirby, & Millett were the solicitors acting for the defendants, and as such in December, 1873, drew up a draft agreement in duplicate relative to the new terms, one part of which was laid before Messrs. Jones and the other retained by Messrs. Gedge, Kirby, & Millett. Messrs. Jones objected to certain of the proposed terms, and both parts of the agreement were then altered in red ink by Mr. Gedge, who acted throughout on behalf of his firm, with a view of meeting Messrs. Jones' objections; and one of such parts, hereinafter called Jones' draft, was towards the end of December, 1873, re-submitted to Messrs. Jones. The other part is hereinafter called Gedge's draft.

1877

JONES v. VICTORIA GRAVING DOCK CO.

3. By clause 8 of these drafts it was stipulated that an annual account should be taken in January in each year, so as to shew among other things the profit and loss of the company in their business.

4. The following is clause 11 as it then stood in both drafts with the red ink alterations (herein printed in italics).

"In taking such annual account as aforesaid, when the gross profits of the year have been ascertained, the following deductions shall be made therefrom for the purposes of this agreement: 1. *A sum of* 200*l. in each year to be paid to or retained by the said Messrs. Jones Brothers for their travelling expenses in and upon the company's business.* 2. *A sum of* 500*l. in each year towards the interest paid by the company upon its debentures.* 3. A sum of 600*l.* in each year for the remuneration of the directors and secretary, and for office expenses in London. 4. All law charges incurred or paid by the company in the year. 5. A sum equal to interest at the rate of 10 per cent. per annum upon all the paid capital of the company over and above the sum of 142,000*l.* 6. Two sums, *one of* 400*l. and the other of* 300*l. in each* year, to be dealt with in manner hereinafter mentioned, and the sum remaining to the credit of profit and loss account, after making these deductions, shall be considered and is hereinafter referred to as the net profits of the company for the year, in respect of which any such account shall have been taken." The figure 142,000*l.* in the above clause was, under any view of the circumstances, an error in the statement of the amount of capital, and under any circumstances would require to be largely increased.

5. By clause 12 it was stipulated that the plaintiffs should receive annually one equal eighth part of the net profits of the company up to the sum of 8000*l.*, and one equal fourth part of such net profits as should be in excess of 8000*l.*

6. On Jones' draft being re-submitted to the plaintiffs as mentioned in paragraph 2, John Jones, one of the members of Jones Brothers, on their behalf objected to the proposed terms as altered and modified in red ink, and upon the 1st of January, 1874, a board meeting of the company was held, at which A., who was a director of the company, and whom the company had authorized to act on their behalf with Mr. Gedge relative to the preparation

and making of the agreement, was present. At this meeting Mr. John Jones again refused to agree to the proposed terms. Mr. John Jones thereupon, being requested so to do, retired from the room, and in his absence certain modifications of the proposed agreement were considered.

7. A. then at the board meeting drew up a paper which was intended by him to represent the ultimatum of the board with reference to the various objections and requirements raised by Messrs. Jones and Mr. John Jones on their behalf. It was as follows:—

"That interest be charged at 5 per cent. instead of 10 per cent. on new capital for extending business. The charge of 500*l.* per annum, interest on debentures, not to be made against gross profits. The minimum salary to be 500*l.* per annum. The charges for insurance (300*l.*) and depreciation (400*l.*) to be as in the draft. All other provisions as in draft."

This paper was, on Mr. John Jones being called into the room, submitted to him as the utmost limit to which the defendants' board would go. Mr. John Jones on reading the paper desired to consult his brothers, the other members of the firm of Jones Brothers who were at Liverpool, on the terms thereof, and took it away with him from the board meeting with that object.

8. The effect of the proposals contained on the paper was to alter the 11th clause of the agreement proposed to Messrs. Jones, as by them understood, and under the circumstances rightly understood, as follows:—

"In taking such annual account as aforesaid when the gross profits of the year have been ascertained, the following deductions shall be made therefrom for the purposes of this agreement: 1. A sum of 200*l.* in each year to be paid to or retained by the said Messrs. Jones Brothers for their travelling expenses in and upon the company's business. 2. A sum of 600*l.* in each year for the remuneration of the directors and secretary, and for office expenses in London. 3. All law charges incurred or paid by the company in the year. 4. A sum equal to interest at the rate of 5 per cent. per annum upon all the share or loan capital of the company over and above the sum of 172,000*l.* raised, called up, or issued for the

1877

JONES v. VICTORIA GRAVING DOCK CO.

purpose of enlarging the docks or extending the business of the company."

The remaining paragraph of the 11th clause was as it already stood in Messrs. Jones' draft.

9. The next meeting of the board was held on the 7th of January, and Mr. John Jones attended and stated that the plaintiffs accepted the terms proposed to them, and on this acceptance the arbitrator found that there was a complete contract between the parties.

10. Mr. Gedge, who was ignorant of the terms contained in the paper submitted to Messrs. Jones by A., had in the meantime altered his (Gedge's) draft, so as to embody what he believed was the effect of the negotiations between the parties. The result was that the 11th clause of the proposed agreement was left by him in effect identical with the clause as set out in the 8th paragraph in this case, except that the figure 162,000 was inserted instead of 172,000. This figure of 162,000 was in any case an error on the part of Mr. Gedge, and in any event would require alteration subsequently.

11. After the acceptance mentioned in the 9th paragraph of this case, the following resolution was written by Mr. Gedge on Gedge's draft:—

"Resolved, that the draft agreement with Messrs. Jones be approved and engrossed in duplicate, and that the seal of the company be affixed thereto."

The resolution was then put to the board, A. being one of it, and carried, whereupon the chairman wrote on Gedge's draft the following:—

"Jan. 7, 74, carried unanimously. Claud Hamilton, chairman."

12. Before the next meeting, but from notes taken at the preceding one, the secretary of the company entered the following minute in the minute book:—

"Mr. John Jones having attended and signified on the part of himself and brothers their willingness to continue the management of the company's works upon the terms of the draft agreement

submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed."

The words "draft agreement" in the above minute, as entered in the minute book, mean "Jones' draft" as altered by the terms expressed on the paper drawn up by A., and hereinafter called B, and by him given to Messrs. Jones.

13. Lord Claud Hamilton, as the first business at the next board meeting of the company, on the 12th of March, signed the above minute in the words and figures following :—

"Read and confirmed: Claud Hamilton."

14. At the meeting on the 7th of January the paper B was not produced by Mr. John Jones. Mr. Gedge, however, obtained from him Jones' draft, and having altered it in accordance with his, Gedge's, idea of what the agreement was, sent it to be engrossed, and sent the engrossment to Messrs. Jones to be signed; they thereupon objected to the figure of 162,000, which was entered in the 11th clause, and a correspondence ensued between Mr. Gedge, the secretary of the company, and Messrs. Jones, the result of which was that the matter stood over to be discussed at the next board meeting, which took place, as before-mentioned, on the 12th of March. The first business thereat was that Lord Claud Hamilton signed the minute of the previous meeting as entered in the minute book by the secretary of the company.

15. At the meeting on the 12th of March, on its being mentioned that Messrs. Jones had taken objection to sign the engrossed agreement containing the figure 162,000, a resolution was passed breaking off all further negotiations.

16. Mr. Gedge, at the time when Lord Claud Hamilton signed the memorandum indorsed on Gedge's draft, did not know of document B, and A. had forgotten its contents. Had A. been aware that the true effect of the proposals mentioned in paragraph 7 was to alter the 11th clause of the proposed agreement, as mentioned in paragraph 8, he would not have made them or assented thereto. When, therefore, the minute states that "it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed," the entry, as far as A. was concerned, was not a true entry of the facts.

18. The Court to have power to draw inferences of fact.

1877

JONES v. VICTORIA GRAVING DOCK CO.

The question for the opinion of the Court was "Whether, under the above circumstances, there is a memorandum of the new agreement such that an action can be brought by Messrs. Jones in respect of the said sum of 1500*l.*"

If the Court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for the said sum of 1500*l.* and costs incurred after the date of award. If the Court should be of opinion in the negative, then judgment is to be entered on the counts for wrongful dismissal for the defendants, and costs incurred after the date of the award.

The draft agreement drawn up in duplicate, as in the 2nd paragraph of the special case is mentioned, commenced thus: "An agreement made this day of , 187 , between the Victoria Graving Dock Co., Limited, hereinafter called the company, of the one part, and John Jones, Charles Jones, and James Jones, all of Liverpool, and trading under the style or firm of and hereinafter called Messrs. Jones Brothers, of the other part." The draft recited, amongst other things, that the company had been incorporated under the Companies Act, 1862, that the directors did, on the 1st of January, 1866, appoint Messrs. Jones Brothers to be managers of the company for a period of eight years thence next ensuing, and that it had been agreed that Messrs. Jones Brothers should continue to act as managers of the company for the period and upon the terms and conditions therein set forth. By the first clause Messrs. Jones Brothers were constituted the sole agents and managers of the company from the 1st of January, 1874, for a period of five years. In addition to the clauses mentioned in the special case, the draft agreement contained others providing for the conduct and management of the business and funds of the company, and for the submission of disputes to arbitration, and it ended with the words, "In witness, &c."

Jan. 16. *A. Wills, Q.C.* (*Rolland* with him), for the plaintiffs cited 2 Taylor on Evidence, ch. 18, par. 937, page 901 (6th ed.); *Birkmyr* v. *Darnell* (1); *Durrell* v. *Evans* (2); *Ridgway* v.

(1) 1 Sm. L. C. 310, at p. 318 (7th ed.), referring to *Shortrede* v. *Cheek* (1 A. & E. 57; 3 N. & M. 866) and *Bateman* v. *Phillips* (15 East, 272).

(2) 1 H. & C. 174; 31 L. J. (Ex.) 337.

9 Jur. N.S. 104.

Wharton (1); The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37.

Benjamin, Q.C. (*Holl* and *Douglas Walker* with him), for the defendants, cited *Peirce* v. *Corf* (2); *Baumann* v. *James* (3); *Hubert* v. *Treherne* (4); *Smith* v. *Webster* (5); *Caton* v. *Caton* (6); *Peek* v. *North Staffordshire Ry. Co.* (7); The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67.

The arguments are sufficiently mentioned in the judgment of the Court.

Cur. adv. vult.

Jan. 23. The judgment of the Court (Mellor and Lush, JJ.), was delivered by

LUSH, J. The question submitted to us is "Whether, under the circumstances above stated, there is a memorandum of the new agreement such that an action can be brought by Messrs. Jones in respect of the said sum of 1500*l.*:" the contention on the one hand being that the signature of the chairman to the minutes of the 7th of January does, and on the other that it does not, constitute a signature to the agreement so as to satisfy the requirements of the 4th section of the Statute of Frauds.

Mr. Benjamin's argument on the part of the defendants embraced several heads of objection, which he contended were involved in the answer to be given to the foregoing questions. Each of these objections we proceed to consider.

He contended, first, that notwithstanding the finding in the 9th paragraph, which is, in effect, that upon the acceptance by the plaintiffs of the terms proposed to them as a modification of the 11th clause of the draft, there was a complete contract between the parties, the Court can see that this is a wrong inference from the facts stated, and that we are bound either to disregard that statement, or to construe it in a sense different from what the words ordinarily import, and to hold that the terms agreed on were merely the heads or leading stipulations of the contract, which

(1) 6 H. L. C. 238; 27 L. J. (Ch.) 46.
(2) Law Rep. 9 Q. B. 210.
(3) Law Rep. 3 Ch. 508.
(4) 3 Man. & G. 743; S.C., sub. nom. *Hubert* v. *Turner*, 4 Scott, N. R. 486; 11 L. J. (C.P.) 78.
(5) 3 Ch. D. 49.
(6) Law Rep. 2 H. L. 127.
(7) 10 H. L. C. 473, at p. 568; 32 L. J. (Q.B.) 241, at p. 270.

1877

JONES v. VICTORIA GRAVING DOCK CO.

were to be afterwards elaborated into detail, and supplemented or varied, as the case might be, when the contemplated deed should come to be settled; in other words, that the parties were not to be bound at all except by deed, and that anything preliminary to the execution of that instrument was to be regarded as negotiation only; and, consequently, that the signature, supposing it to be otherwise sufficient, was not the signature to an "agreement" or to a "note or memorandum of an agreement," but to a mere outline which required filling up in order to become an agreement.

We are unable to discover any ground for this objection. The duplicate draft sent to the plaintiffs in the first instance is in the form of a complete contract. It commences in the usual way: "An agreement made between," &c. (naming the parties on both sides); it contains numerous minute stipulations, leaving apparently nothing to be supplied, and concludes with the usual formula, "In witness, &c." The only alteration proposed and agreed to was the series of stipulations contained in the paper drawn up by A., and which was intended to represent the ultimatum of the board with reference to the various objections and requirements raised by the plaintiffs. The paper so drawn up by A., concludes with the words, "all other provisions as in draft:" all the details were settled; and when that paper was categorically accepted by the plaintiffs as the only amendment or alteration in the draft agreement required by them, all discussion as to terms was at an end. Nothing is said in either paper about any further document being prepared, and even the resolution of the company set out in the 12th paragraph, upon which so much stress was laid, does not say that a deed embodying those terms shall be prepared and executed, but that "the said agreement be engrossed in duplicate, signed, sealed, and executed;" not a new document based upon that agreement containing other terms, but a copy of that draft itself, as modified by the paper drawn by A., was to be the one, which was to be executed as a deed, and was intended only as a matter ancillary to the actual agreement, which was contained in the original draft as amended by paper B. It does not appear that the plaintiffs contemplated even a sealed agreement, but whether they did or not, neither party could claim to

make any alteration in any particular from the draft so agreed upon.

Mr. Benjamin dwelt much upon the fact that the amount of the old capital was not stated in the draft B; but that of itself does not argue that the stipulation was considered imperfect, or shew an intention to have anything more explicit. The parties apparently had not agreed what the amount was, and this was left as a matter to be ascertained; and we cannot suppose it could not have been ascertained, in case any difficulty should arise thereafter upon that subject. The defendants, therefore, have failed to shew that this was not what it purported to be—a complete "agreement" between the parties.

The next point on which the defendants rely is that the signature of the chairman to the minutes of the meeting of the 7th of January, which minutes were read and confirmed on the 12th of March, was not a signature within the meaning of the Act. This objection was based upon three grounds.

First, it was contended that the signature of the chairman to the minutes was put in order to verify the proceedings of the board in obedience to the Companies Act, 1862 (1), and not in order to attest or verify the contract, and that as the signature was put alio intuitu, it cannot be available for the purpose of satisfying the Statute of Frauds. We think there is more ingenuity than force in this argument. The signature required by the 4th section is not of the substance of the contract; it is matter of procedure only, (*Leroux* v. *Brown* (2)), and is required as evidence of the contract. To prevent frauds and perjuries, the Act will not allow any other kind of proof than the writing itself (if it be in writing) or a written admission that the contract was made, and that it was signed in either case by the party to be charged. But so that this kind of

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67, "Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company, in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings."

(2) 12 C. B. 801; 22 L. J. (C.P.) 1.

1877

JONES v. VICTORIA GRAVING DOCK CO.

evidence is given, it matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract. Now the minute affirms that the company at their previous meeting had submitted to the plaintiffs a draft agreement, and that the plaintiffs had expressed their willingness to continue the management of the company's works upon the terms of that draft, and that the company then resolved that "the agreement should be engrossed, sealed, and executed." The chairman attests by his signature the accuracy of the minute, and that it had been at that second meeting read and confirmed. What is this but an assertion, under the hand of the company's agent, that the company had entered into the agreement which was contained in the draft referred to. It is not the less efficient as a signed admission of the contract, because it was made as a record of the proceedings of the company under the obligation of the Companies Act, 1862, s. 67. The question is not what its object was, but whether it is a written and signed statement of the contract.

Secondly, it was objected that the draft, not having been itself signed, could not be connected by parol with the signed statement. This point was one of those argued in the House of Lords in *Ridgway* v. *Wharton* (1), cited in the argument, and conclusively disposed of by the judgment of the House in that case.

The third objection was that the minute verified only draft B, and that was only one of the articles of the agreement, and consequently part only of the contract. But that draft also in terms incorporates itself with the original draft, and there can be no more objection to identifying the draft so referred to by parol than there is to identifying draft B as the draft referred to in the minute. The two together manifestly make up the entire agreement; B being obviously a substitute for the 11th article of the original draft.

Great stress was laid by Mr. Benjamin upon the indorsement on Gedge's draft set out in paragraph 11 of the case and the signature of the chairman thereto, and it was argued that that was the contract, if there was one, which the company signed. It is clear, upon

(1) 6 H. L. C. 238; 27 L. J. (Ch.) 46.

the statements in the case, that the resolution was indorsed upon that draft by mistake, and upon the supposition that it had been altered in accordance with draft B. Whether that indorsement and signature could have been applied to draft B, if there had been no other signed recognition of it, we need not consider. It is enough to say that it cannot have the effect of neutralizing the signed minute, which in terms referred to the draft agreement submitted by the board to the plaintiffs, and which was without reserve accepted by the plaintiffs.

We therefore give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

The defendants appealed.

April 14. *Wills, Q.C.* (*Rolland* with him) for the plaintiffs, objected that there could be no appeal in this case. In the first place, where an arbitrator has, under the 5th section of the Common Law Procedure Act, 1854, stated a case, there can be no appeal in the nature of a writ of error: *Gumm* v. *Fowler* (1): for the decision of the Queen's Bench Division is not a judgment of the Court on which under s. 32 error might be brought, but is merely the opinion of the Court on which judgment may be entered pursuant to the terms of the award. Secondly, there is an express agreement not to bring any writ of error, which must mean not to appeal, and a similar agreement was held to be a bar to any appeal in *Gumm* v. *Fowler* (1), which was decided in 1860, and has ever since been acted upon. (2)

Benjamin, Q.C. (*Holl,* and *Douglas Walker* with him), for the defendants. The defendants are not bringing a writ of error, or taking proceedings against the arbitrator or any one. The arbitrator has given a conditional award, and has not said that the parties may not appeal against the decision of the Queen's Bench Division. This is not an appeal against the award, but a proceeding collateral to it. The parties have had the opinion of one branch of the Supreme Court, and there is nothing to prevent them from having the opinion of the Court of Appeal, which is another branch. In *Gumm* v. *Fowler* (1), the agreement not to

(1) 2 E. & E. 890; 29 L. J. (Q.B.) 189. 6 Jur. N.S. 1093,

(2) See *Courtauld* v. *Legh*, Law Rep. 4 Ex. 187.

1877

JONES v. VICTORIA GRAVING DOCK CO.

bring a writ of error was clearly misinterpreted: for the words were insensible, writs of error having been abolished in civil cases by the Common Law Procedure Act, 1852, s. 148. Any judgment of the Queen's Bench Division must, under the Supreme Court of Judicature Act, 1873, s. 19, be subject to appeal.

49 QBD 423.

LORD COLERIDGE, C.J. I am of opinion that the preliminary objection must prevail. This was an action which was referred in 1875 (before the coming into operation of the Judicature Acts), under the powers of the Common Law Procedure Act, 1854, and the order refers the cause "to the award, order, arbitrament, final end, and determination of the arbitrator," who is to have all necessary powers, and so forth. At that time the Common Law Procedure Act, was in force, as, indeed, it is now; and the 5th section of the Common Law Procedure Act (1) is to be taken in conjunction with this order of reference. [The Lord Chief Justice then read the section and the finding on the award.] I may observe that the words in the 5th section "if so ordered" must mean "if ordered by the arbitrator"—they cannot mean "by the Court;" at least, it would be a very strange and unreasonable construction of the section to say that the judgment may, if ordered by the Court, be entered according to the opinion of the Court; for if the Court has to order the judgment to be entered, of course it would order it to be entered in accordance with the opinion that has been pronounced by the judges of the court. In this case the order that the judgment should be entered is, according to the true and proper construction of the 5th section of the Common Law Procedure Act, 1854, an order made by the arbitrator himself. The Queen's Bench Division gave judgment in favour of the plaintiffs upon the question referred to them as to the Statute of Frauds, and, thereupon, under the order of the arbitrator, judgment is entered for the plaintiffs in the Queen's Bench Division of the High Court for 1500*l.* and costs. This is an appeal from that judgment, and the objection to it is that no appeal will lie.

The objection is on two grounds: first, that this was a proceeding

(1) 17 & 18 Vict. c. 125, s. 5.

under the Common Law Procedure Act, 1854; that the Court did not give a judgment, and that this was a mere question asked of the Court as to one portion of the whole subject-matter of the arbitration; that the answer of the Court was for the instruction of the arbitrator; that the judgment was the judgment of the arbitrator, and not of the Court; and that the 32nd section of the Common Law Procedure Act, which says that "error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary," has no application, because this is not a judgment of the Court, but of the arbitrator. If the matter stood on the Common Law Procedure Act, I should be of opinion that this was a judgment of the arbitrator, because it seems to me that the matter is substantially still in his power. The arbitrator upon one specific point asked the opinion of the Court, and in order to prevent the case coming back to him, having made up his mind to act according to the opinion of the Court on the question of law, he gives his award as the Court may decide upon that question. If the Court decides it one way then judgment is to be entered for the plaintiffs; if it decides the other way, then the judgment is to be entered for the defendants. I should, therefore, have thought that if it stood on the Common Law Procedure Act alone the objection was well founded.

But the objection does not stand on the Common Law Procedure Act alone and on the construction which we are to give to it, for it is said that the parties have expressly agreed that there shall not be any writ of error or appeal. We find this very question raised in *Gumm* v. *Fowler* (1), which is hardly to be distinguished from this case. In that case the Court held substantially, that these words as to bringing no writ of error really meant that there should be no questioning of the opinion of the first Court whose opinion was asked. It has been pointed out that a writ of error was not applicable to the particular case—that a writ of error would not in that case have lain. It would have lain if procedure by writ of error at that time existed, but it did not exist, therefore the Court of Queen's Bench in that case had to give a reasonable

(1) 2 E. & E. 890; 29 L. J. (Q.B.) 189.

1877

JONES v. VICTORIA GRAVING DOCK CO.

4QBD422

interpretation to the expression "writ of error;" and they held that the parties agreeing that there should be no writ of error, meant to agree that there should be no questioning of the judgment of the first Court which the arbitrator consulted, and that the decision of the arbitrator should be final, subject to his asking the opinion of the Court as to this or that particular matter. I am, myself, not at all disposed to differ from the judgment which was pronounced in the case of *Gumm* v. *Fowler* (1). The Court consisted of the present Lord Chief Justice, Mr. Justice Crompton, Mr. Justice Hill, and Mr. Justice Blackburn. They were unanimous, and we are given to understand that it has been an unquestioned decision from that time to this. It appears to me, therefore, that if I look at the terms of the Common Law Procedure Act, or if I look at the terms used by the parties as interpreted by the authority of this case, neither under the Common Law Procedure Act, nor consistently with the agreement between the parties, can the judgment of the Queen's Bench Division be open to appeal. Mr. Benjamin very properly brought before us the strong language of the Judicature Act, and undoubtedly if this were an order of the Queen's Bench Division of the High Court of Justice it would seem to come within the very wide words that every order may be questioned upon appeal. But I am of opinion in the first place, that this is not an order within the meaning of that section. This is not an order of the High Court, and the proceedings before the Queen's Bench Division were simply ministerial in performing that which the arbitrator himself had jurisdiction to do—merely pursuing his directions in entering the judgment as he had ordered it to be entered; and therefore within the meaning of the Judicature Act this is not a judgment or order of the Queen's Bench Division. I should primâ facie be of that opinion; but independently of that I think it clear that the parties had agreed that there should not be an appeal. The words "writ of error" in this order of reference, made before the Judicature Act came into operation and before proceedings in error were altogether abolished, must receive a reasonable interpretation, and must mean that the parties shall not controvert

(1) 2 E. & E. 890; 29 L. J. (Q.B.) 189. 6 Jur. NS 1093

on appeal the finding or decision of any Court to which the arbitrator shall refer any question. On that ground, also, I hold that there is no appeal.

BRAMWELL, L.J. :—The question which the parties have argued before us is whether there is jurisdiction to hear this appeal. One point taken is, that the parties have agreed that there shall be no appeal, and that this application is a breach of that agreement. That, in my opinion, must be decided in favour of Mr. Wills' contention; I am of opinion that this is an appeal contrary to the agreement of the parties, and therefore my judgment is in favour of Mr. Wills upon that contention.

If this be a matter in which the arbitrator is merely asking the advice of the Court, I should think that that advice when given is not an order from which there could be an appeal. But I am not without a misgiving on the matter when I read the words in the 5th section of the Common Law Procedure Act, 1854. The arbitrator may state his award as to the whole or any part thereof in the form of a special case. Now what is that in plain English? It is simply making an award in the shape of a special case, and if an arbitrator appointed merely to find the facts in an action states a special case, it is clear that an appeal would lie from it under the 32nd section of the Act. He may, as to some matters, conclude at once and as to other matters, he may state a special case. The 5th section goes on: "and when an action is referred" —not otherwise, and I suppose where there is no action referred the ordinary application would have to be made for leave to issue execution—"judgment if so ordered may be entered according to the opinion of the Court." It appears to me that the effect is that, unless the parties have agreed to the contrary, the arbitrator instead of awarding in the matter may state a special case for the Court to give their judgment upon. Notwithstanding my very great respect for the judges who expressed the opinion they did in *Gumm* v. *Fowler* (1), I have much misgiving with respect to it; therefore I only put my judgment on this ground that I think this appeal is contrary to the agreement which the defendants, I have no doubt, most unwittingly, entered into.

(1) 2 E. & E. 890; 29 L. J. (Q.B.) 189.

1877

JONES v. VICTORIA GRAVING DOCK CO.

BRETT, L.J. I can only agree with the decision of the Queen's Bench Division on the same ground which my Brother Bramwell has just stated, namely, that the parties have by their own agreement precluded themselves from appealing.

I should otherwise have had very great doubts whether an appeal does not lie. I should have very great doubts whether it did not lie under the Common Law Procedure Act, and I should have had still more doubts whether it does not lie under the Judicature Act. I agree that, according to section 5 of the Common Law Procedure Act, 1854, it is at the option of the arbitrator whether he will state a case or not; but if he does elect to state a case, he is to state the award in the form of a special case, and I have very great doubt whether the effect of that is not to put him in the position of a person who is to state a case for the opinion of the Court, or whether, at all events, it is not his award with the facts upon the face of it, which if it is erroneous and wrong would be the subject of appeal. Moreover, with the greatest deference, I have considerable doubt whether the words "if so ordered," inasmuch as they are to apply to a judgment in an action which is the judgment of the Court, do not apply to the Court and not to the arbitrator. I was not aware that we were about to enter into that consideration, I therefore only express considerable doubt about it, and I desire to reserve, so far as my own individual judgment is concerned, every such question which may arise where there is no agreement by the parties that they will not appeal.

But I think that the words of this reference do, according to the decision in *Gumm* v. *Fowler* (1), amount to an agreement that there shall be no appeal against the opinion of the Court or the decision of the arbitrator. Whether I should have thought so or not at the time when that case was decided, I do not know. But that case was decided in 1860, and the interpretation then given to those words has been adopted in the recognized books of the profession ever since. Therefore, I think it must be taken that these parties, when they entered into this agreement of reference, must have intended that the meaning of those words should be the

(1) 2 E. & E. 890; 29 L. J. (Q.B.) 189.

meaning given in *Gumm* v. *Fowler* (1), and that, therefore, there is an express agreement here that there should be no appeal.

1877

JONES v. VICTORIA GRAVING DOCK CO.

Appeal dismissed.

Solicitors for plaintiffs: *W. W. Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for defendants: *Gedge, Kirby, & Millett.*

WARD *v.* HOBBS.

April 21.

False Representation — Contagious Disease, Animals affected with—Sale in Market—Implied representation that Animals not suffering from Disease —Conditions of Sale—Contagious Diseases (Animals) Act, 1869 (32 & 33 *Vict. c.* 70), *s.* 57.

A person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to animal life; and a condition of sale that they are to be "taken with all faults" does not negative or qualify this representation.

THIS was an action for breach of warranty and false representation as to the condition of certain pigs sold by the defendant to the plaintiff.

At the trial before Brett, J., it appeared that the pigs had formed part of a herd, many of which had previously died of typhoid fever, a disease very infectious and fatal to animal life. They were sent in an infected state by the defendant to a public market for sale by auction, and were purchased there by the plaintiff. At the time of the sale they shewed no outward symptoms of the disease, but, as appears hereafter from the judgment, in the opinion of the Court there was evidence to go to the jury that the defendant knew when he sent the pigs to market that they were infected with the disease. The defendant made no express representation as to the condition of the pigs; and the sale was subject to certain conditions of sale, one of which was as follows: "No warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any

(1) 2 E. & E. 890; 29 L. J. (Q.B.) 189.

1877

WARD v. HOBBS.

fault or error of description of any lot in the catalogue." After the pigs were removed from the market by the plaintiff's servants symptoms of the disease appeared among them. The pigs affected ultimately died, and the plaintiff incurred considerable loss, to recover which he brought this action.

On these facts the learned judge refused to nonsuit the plaintiff, and the jury found a verdict for the plaintiff for 66*l.* 19*s.*, the amount of the loss. Judgment was accordingly entered for the plaintiff, leave being reserved to the defendant to move to enter the judgment for himself by way of nonsuit, on the ground that there was no evidence to go to the jury of a warranty or misrepresentation as to the condition of the pigs.

Feb. 12. *Powell, Q.C.*, and *H. D. Green* moved accordingly. There was no evidence of liability on the part of the defendant. The conditions of sale expressly negatived any warranty. There being no express representation, but, on the contrary, an express announcement that the sale was with all faults, there was nothing amounting to a false representation as to the condition of the pigs. The purchaser must be taken to have bought upon his own judgment and observation as to the soundness of the animals he was buying.

H. Matthews, Q.C., and *Bros* shewed cause. It being a criminal offence both at common law and under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57, to expose animals suffering from a contagious disease in a public market, there was evidence of a representation, to be implied from the fact of sending the pigs to market, that they were not suffering from a contagious disease. The purchaser was entitled to presume that the seller was not committing an offence, and that from their being so sent the seller did not suppose that they were infected. [They cited *Smith* v. *Green* (1); notes to *Chandelor* v. *Lopus* (2); *Bedford* v. *Bagshaw.* (3)]

Powell, Q.C., in reply. The cases which shew that it is an indictable offence to expose infected persons or animals for sale are all cases in which there was danger of infection to man: *Rex*

(1) 1 C. P. D. 92. (2) 1 Sm. L. C. 7th ed. 173.
(3) 4 H. & N. 538; 29 L. J. Ex. 59.

v. *Vantandillo* (1); *Rex* v. *Burnett* (2); *Reg.* v. *Henson.* (3) [He also cited *Emmerton* v. *Matthews* (4); *Hill* v. *Balls* (5); *Gorris* v. *Scott* (6); *Couch* v. *Steel* (7); *Jones* v. *Just.* (8)] (9)

Cur. adv. vult.

April 21. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. We intimated at the close of the argument the opinion we had formed; but as the circumstances are novel, and it was strongly urged that there was not sufficient evidence of the scienter, we took time as well to reconsider our opinion as to examine more minutely the evidence. We have carefully gone through the judge's notes, and we agree with the learned judge that there was evidence such as he could not properly have withdrawn from the consideration of the jury. It must, therefore, upon the finding of the jury, be taken as an established fact that the defendant, when he sent the pigs to the market, not only had every reason to believe, but did believe, as the fact was, that although no outward signs of the malady were discovered in the market, the pigs were tainted with the disease, which had carried off several of the herd and which was then prevalent in the district, that disease being one of a highly infectious nature and dangerous to animal life. And the question is whether, under these circumstances, the defendant is responsible to the buyer for his loss, notwithstanding that he made no representation in words as to the condition of the pigs, and notwithstanding that he guarded himself by conditions of sale which stipulated that the buyer was to take them with all faults. We are of opinion that he is liable. It is not necessary on this occasion to enter into the question whether, if the sale had taken place on the defendant's premises, instead of in the market, the maxim "caveat emptor"

(1) 4 M. & S. 73.
(2) 4 M. & S. 272.
(3) 1 Dears C. C. 24.
(4) 7 H. & N. 586; 31 L. J. (Ex.) 139.
(5) 2 H. & N. 299; 27 L. J. (Ex.) 45.
(6) Law Rep. 9 Ex. 125.
(7) 3 E. & B. 402; 23 L. J. (Q.B.) 121.
(8) Law Rep. 3 Q. B. 197.
(9) There was considerable argument as to whether there was any evidence to go to the jury of the scienter, but neither the facts nor the argument as to this are given as not material for the purposes of the legal point here reported.

1877

WARD v. HOBBS.

would have protected him. We desire to leave this question entirely open. The pigs had been brought into a public market and were there exposed for sale, and this circumstance opens other and wider considerations than necessarily belong to a private sale on the seller's own premises. It is an indictable offence at common law to bring a glandered horse into a public place to the danger of infecting the people there: *Reg.* v. *Henson* (1); as it is indictable needlessly to expose in a public street a child afflicted with the smallpox: *Rex* v. *Vantandillo* (2); *Rex* v. *Burnett* (3); and reasons equally cogent forbid the bringing into a market animals in a known state of disease, which endangers the health of other animals in the market, especially when they are such as are destined for human food. The Contagious Diseases (Animals) Act, 1869, extends and enforces the common law duty. The 57th section enacts, that "If any person exposes in a market, or fair, or other public place where horses or animals are commonly exposed for sale, or exposes for sale in any sale yard, whether public or private, or places in a lair or other place adjacent to or connected with a market or fair, or where horses or animals are commonly placed before exposure for sale, or sends or causes to be carried on a railway or on a canal, river, or other inland navigation, or on a coasting vessel, or carries, leads, or drives, or causes to be carried, led, or driven, on a highway or thoroughfare any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews to the satisfaction of the justices before whom he is charged that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge." Although the act of exposing in a market for sale animals destined for human food does not imply a warranty that they are free from disease, so as to make the seller responsible if they should turn out to be infected, whether he knew of their condition or not: *Emmerton* v. *Matthews* (4): it does, we think, amount to a representation that as far as he knows they are not so infected. By bringing them into a market from which he knows that infected animals are by law excluded he intends the public to understand

(1) 1 Dears. C. C. 24.
(2) 4 M. & S. 73.
(3) 4 M. & S. 272.
(4) 7 H. & N. 586; 31 L. J. (Ex.) 139.

8 Jur. N.S. 61

1877

WARD v. HOBBS.

that he believes them to be marketable; and when he does this, with knowledge that they are tainted with a contagious or infectious disease, he is as much guilty of deceit as if he had made the representation in words. Then, does the condition of sale that they are to be taken "with all faults" negative or qualify this representation? We think not. The words of the condition are: "No warranty will be given by the auctioneer with any lot; and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lots in the catalogue." There is nothing here which suggests to the buyer that the pigs were the remnant of a diseased herd, many of which had died; nothing inconsistent with the representation implied by the act of bringing them to the market. If this implied representation were put into words, together with the condition, it would be no more in effect than this: "I believe them to be free from infection, but I will not warrant that they are, and the buyer must take all risks." For these reasons we hold that the motion for a nonsuit must be refused, and the judgment be entered for the plaintiff for the amount found by the jury, 66*l.* 19*s.*

Judgment for the plaintiff.

Solicitors for plaintiff: *Abbott & Co.*
Solicitors for defendant: *Richards & Walker.*

WIMSHURST, HOLLICK, & Co. *v.* THE BARROW SHIPBUILDING COMPANY.

May 7.

Costs—Judicature Act, 1875, *Order LV.—Reference—Common Law Procedure Act,* 1854, *ss.* 3–6—*Order of Reference silent as to Costs.*

A cause having been referred to a master, under the provisions of the Common Law Procedure Act, 1854, as a matter of account, and the order of reference being silent as to the costs, the Court refused an application, under Order LV., for an order for costs on behalf of the party in whose favour the award of the master was made.

13 C.L.D. 355

THIS was an action for 81*l.* 10*s.* 8*d.* in respect of repairs alleged to have been done by the plaintiffs to the defendants' ship. The

1877

WIMSHURST v. BARROW SHIP-BUILDING CO.

defendants had paid money into court. At the trial it was agreed that a formal judgment should be entered for the plaintiffs for the amount claimed, and that the accounts should be referred to a master, under the provisions of the Common Law Procedure Act, 1854, as to references of matters of account, to find for what amount the judgment should ultimately be entered. The order of reference, which was drawn up "by consent of the parties," was silent as to costs, and there was no provision that the judgment entered for the plaintiffs might be vacated and judgment entered for the defendants if the master should find the amount paid into court sufficient. The parties subsequently went before the master, who made an award that nothing was due to the plaintiffs beyond the amount paid into court. He made no order as to costs.

Webster moved to enter the judgment for the defendants, pursuant to the award of the master, or in the alternative for an order giving the defendants their costs.

There is, perhaps, some difficulty with regard to the first alternative, there being no provision in the order of reference for vacating the judgment already entered, and the terms of Order XL., it must be admitted, do not seem quite appropriate to the case, but it is contended that the Court can make any order they think fit as to costs under Order LV.: *Baker* v. *Oakes.* (1) [The Court referred to *Leggo* v. *Young* (2); *Bell* v. *Postlethwaite* (3); and suggested that the application might be to amend the order of reference.] It must be admitted that there are no materials in the defendants' affidavit to shew that the order of reference was contrary to the intention of the parties.

Day, Q.C., and *Somerville* shewed cause. Order LV. does not apply. For the proceedings subsequent to the agreement to refer ceased to be proceedings in the High Court of Justice. The Court cannot go beyond the terms of the agreement between the parties, by which the cause was withdrawn from the ordinary course of proceedings in the court and referred. There is nothing to shew that it was not the intention of the parties that there

(1) 2 Q. B. D. 171. (2) 16 C. B. 626; 24 L. J. (C.P.) 200.
(3) 5 E. & B. 695; 25 L. J. (Q.B.) 63.

should be no costs on either side. In the absence of evidence to the contrary, they must be taken to have meant what the natural construction of the agreement imports.

Webster, in reply.

MELLOR, J. I should have been glad if we could have come to the conclusion suggested on behalf of the defendants. But I do not think that we can do so upon the true construction of the order of reference. I do not think that this was a proceeding in the High Court within the meaning of Order LV. I was at first impressed with the suggestion that that order gave a general power over costs in all proceedings in the High Court and matters connected with such proceedings. But it is clear that the old procedure as to references under the Common Law Procedure Act is still in existence, and that procedure is applicable when, by agreement between the parties, the proceedings are under that Act, and so distinct from the proceedings in the High Court. The parties agreed that the further proceedings should become collateral to the proceedings in the action, and it then depended on the agreement between the parties whether there should be any costs or not. We have no materials before us for coming to the conclusion that there was any mistake in drawing up the order of reference as it was drawn up. Under these circumstances, I am of opinion that Order LV. does not apply, and this order must be refused.

FIELD, J. I am of the same opinion. The application is for one of two alternatives. First, we are asked to enter judgment according to the award. But ultimately it was admitted that Order XL. did not apply, and that part of the application was not pressed. Then we are asked for an order giving the defendants their costs. My view is, that in general the successful party ought to have his costs, and, consequently, I should be inclined, if possible, to assist the defendants. If this had been a proceeding in the ordinary course, and consequently a proceeding in the High Court, but owing to some omission or for any reason the successful party could not get his costs without an order, I should have held that we ought to make an order for costs under Order LV., but

1877

WIMSHURST v. BARROW SHIP-BUILDING CO.

that is not this case, and I do not think we ought to apply the power given by that order. Where, for any reason, the parties have agreed that the proceedings should be taken out of their ordinary course, and dealt with under the provisions of the Common Law Procedure Act as to references, I think we must look to those provisions for the purpose of construing the agreement. I think that we must, upon the materials before us, look only to what appears within the four corners of the order of reference. The parties having come to an agreement that judgment should be entered for the plaintiffs, and that it should be referred to the master to find what was due, it was competent to them when making that agreement to have inserted terms as to costs, or an application might have been made to a judge under s. 3 or s. 6 of the Common Law Procedure Act as to costs. If the subject of costs had been brought forward at the time of drawing up the order no doubt some provision would have been made for them. It is common in settling at nisi prius the terms of reference to provide that the matter shall be referred "upon all usual terms." "Usual terms" are commonly understood to mean that the costs of the action shall abide the event, and the costs of the reference and award shall be in the discretion of the arbitrator. But there is no such provision in this order. It seems to me that on the true construction of this order the parties put themselves not on the terms of the Judicature Act, but on those of the Common Law Procedure Act. That being so, the cases of *Leggo* v. *Young* (1); *Bell* v. *Postlethwaite* (2), shew that there is no power to give costs.

I doubt whether there is any power under Order LV. to give these costs as incident to any proceeding in the High Court, and if there were such a power I do not think we ought to exercise it, having regard to the terms of the agreement between the parties.

Order refused.

Solicitors for plaintiffs: *Bolton & Co.*

Solicitors for defendants: *Scott & Jarmain.*

(1) 16 C. B. 626; 24 L. J. (C.P.) 200.

(2) 5 E. & B. 695; 25 L. J. (Q.B.) 63.

HOOPER AND ANOTHER *v.* BOURNE, THE WESTBURY IRON COMPANY, AND THE GREAT WESTERN RAILWAY COMPANY.

1877
May 8.

Lands Clauses Consolidation Act (8 & 9 *Vict. c.* 18) *s.* 127—*Superfluous Lands —Lands not in actual Use for purposes of Undertaking.*

Where lands have been taken compulsorily under the powers of a railway Act, and retained by the company with the bonâ fide intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous lands within sect. 127 of the Lands Clauses Consolidation Act.

Great Western Ry. Co. v. *May* (Law Rep. 7 H. L. 283) distinguished.

SPECIAL CASE stated in an action of ejectment. The facts and the nature of the arguments sufficiently appear from the judgments.

1877. April 17. *Merewether, Q.C.* (*Kinglake* with him), for the plaintiffs, cited *Great Western Ry. Co.* v. *May* (1); *Lord Carrington* v. *Wycombe Ry. Co.* (2); *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (3)

Thesiger, Q.C. (*C. S. C. Bowen* with him), for the defendants, cited *Betts* v. *Great Eastern Ry. Co.* (4); *Great Western Ry. Co.* v. *Smith* (5); *Stockton and Darlington Ry. Co.* v. *Brown.* (6)

Merewether, Q.C., in reply.

Cur. adv. vult.

May 8. The following judgments were delivered:—

MELLOR, J. This is a special case stated by an arbitrator, with the power for the Court to draw inferences of fact.

The action in which this case is stated is an action of ejectment, brought by the plaintiffs to recover three several parcels of land, containing together about thirteen acres in the parish of Westbury and county of Wilts, alleging them to be superfluous lands under the provisions of the Lands Clauses Consolidation Act (8 & 9 Vict.

(1) Law Rep. 7 H. L. 283.
(2) Law Rep. 3 Ch. 377.
(3) Law Rep. 2 H. L., Sc. 160.
(4) Law Rep. 8 Ex. 294.
(5) 2 Ch. D. 235.
(6) 9 H. L. C. 246.

1877

HOOPER v. GREAT WESTERN RAILWAY CO.

c. 18, s. 127), which is incorporated with the local Acts referred to in the case, and the question is, whether, or not, the circumstances of the present case and the inferences which ought to be drawn therefrom distinguish it from the judgment and reasoning of the House of Lords in the case of *Great Western Ry. Co.* v. *May*. (1) Upon a careful consideration of the facts stated in this case, and drawing reasonable inferences therefrom, I have come to the conclusion that the present case is clearly distinguishable from that of *Great Western Ry. Co.* v. *May* (1), and that our judgment ought to be for the defendants. The land in question was originally acquired under the powers of the Wilts, Somerset, and Weymouth Railway, as constituted and amended by the several Acts referred to in the case. No notice to treat was ever given to the owners in respect of such lands, but by an agreement of the 1st of March, 1848, made between the trustees of the Rev. John Hooper and Elizabeth his wife and the Wilts, Somerset, and Weymouth Railway Company, the land in question, with other land then in two parcels, and containing together nineteen acres, with all mines thereunder, were contracted to be sold to the Wilts, Somerset, and Weymouth Railway Company for 3280*l.*, which was to be in full satisfaction of all works of accommodation and of all severance or other damage, which said lands were accordingly, on the 28th of March, 1848, duly conveyed unto the said company, their successors and assigns, with a cottage tenement, and out-house erected on one of the said pieces or parcels of land, together with all mines and minerals thereunder, for the sum agreed upon, which was to be in full satisfaction of all compensation to which they might otherwise have been entitled in respect of severance from other lands of the vendors. Shortly after the completion of the purchase the said company took possession of the lands so conveyed, and upon part thereof, being about six acres, constructed in part the line of railway, station, and other works known as the Westbury station. They also set out and made upon part of the said land a road called the "Station Road" for the purposes of access to the passenger station, which is and always has been since used for the purposes of the said station. They also made a well, in the year

(1) Law Rep. 7 H. L. 283.

1848, on a portion of the land for supplying a tank erected on the premises with water for engine purposes. The said company being then apparently unable to carry out the original purposes of the purchase, but desiring to render the residue of the land productive, let it to a tenant from year to year for agricultural purposes, but subject to the right of the company to resume possession on a two months' notice at any time, whenever it might be required for any purpose connected with the said railway. All this was done by the Somerset, Wilts, and Weymouth Railway Company before it was dissolved and the undertaking transferred to the Great Western Railway Company by the Act of 1851, as stated in paragraph 5 of the case. Subsequently to the transfer of the said undertaking to the Great Western Railway Company it was found that the well which had been made as before stated, by the Somerset, Wilts, and Weymouth Railway Company, gave an insufficient supply of water, and thereupon a reservoir eighty feet long, forty feet wide, and thirteen feet deep, was made on other portion of the land, which was and is supplied with water by the natural drainage of the surrounding lands, and is connected with the well by pipes for the supply of the engines and use for railway purposes. The cottage also was occupied by one of the railway servants. A smithy was erected by the Great Western Railway Company in 1872 for the use of the railway, and on the 18th of August, 1871, the land formerly demised for agricultural purposes was let to the Westbury Iron Company, Limited, together with a licence to get the minerals on and under such land, but determinable upon twenty-eight days' notice by the Great Western Railway Company, and it was agreed that the working and removing of the iron ore should be done to the satisfaction of the company's engineer, and that all holes made thereon should be filled up and resoiled as set forth in the indenture set out in Appendix E. The said iron company, limited, has been since and is now in the possession of such land under such letting and licence. It is further expressly found by the special case that since the year 1868 the traffic at the Westbury station has much increased, and that during that time the said three pieces of land "have been and still are required for the purpose of constructing additional sidings upon them to accommodate the increased traffic." It further appears that

1877

HOOPER v. GREAT WESTERN RAILWAY CO.

although the want of such additional accommodation has been the subject of much discussion by the district officers of the railway having the supervision of the traffic at that station, owing to financial reasons and the necessity of applying the funds of the company to other works, nothing has as yet been done to supply additional accommodation at the Westbury station. It further appeared that nineteen acres of land so purchased as aforesaid are included in the plans and books of reference deposited with the clerk of the peace for the county of Wilts, and all but seven and a half acres were included within the limits of deviation marked thereon. The time originally limited by the Wilts, Somerset, and Weymouth Amendment Act for completion of the works of the railway had been by warrant of the Railway Commissioners, dated the 12th of April, 1848, duly extended to the 3rd of August, 1853.

Upon the argument before us it was contended for the plaintiffs that although such land was acquired by voluntary agreement and not under any notice to treat, it was under the circumstances to be considered as land acquired under the compulsory powers of the Wilts, Somerset, and Weymouth Railway Company's Act, and that on the expiration of the ten years from the 3rd of August, 1853, to which date the time for completing of the works had been so extended, the lands not then used for the purpose of the railway became surplus lands within the meaning of the 127th section of the Lands Clauses Act, and then vested in the plaintiffs as representing the then owners of the adjoining lands, or at least a portion thereof proportional to the extent to which the same abutted on the adjoining lands of the plaintiffs.

Mr. Thesiger, on the part of the defendants, raised no distinction as to portions abutting on the highways, but contended that the lands in question never became superfluous lands within the meaning of s. 127 of the Lands Clauses Act; first, because the dealing with such lands by the Wilts, Somerset, and Weymouth Company, and subsequently by the Great Western Railway Company, was entirely inconsistent with such a conclusion. In the second place he contended that inasmuch as no notice to treat had ever been given by the Wilts, Somerset, and Weymouth Company to the owners, but the lands had been sold and conveyed by such

owners together with the minerals, it shewed that the transaction was not in any sense a compulsory purchase under the special powers of the company. It is not necessary to decide whether or not the latter contention can be maintained, because I am of opinion that upon the facts stated in the present case, and the inferences which ought to be drawn therefrom, the lands in question never did become superfluous lands within the meaning of the 127th section, and never did vest in the plaintiffs. Although not intending to decide upon the merits of Mr. Thesiger's second contention, I am at liberty to refer to the fact that the lands were acquired by agreement, voluntarily made, and were intended for the site of the Westbury station, and that they must in the usual course of things have been purchased under the advice of the defendants' engineer, as lands likely to be actually required for the erecting and completing the accommodation which the traffic in its development might demand within some reasonable time: *Brown* v. *Stockton and Darlington Co.* (1), referred to by the Lord Chancellor in *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (2), and per Blackburn, J., in *May* v. *Great Western Ry. Co.* (3): and it is expressly found in the case, that since 1868 the land in question "has been, and still is, required for the purpose of constructing additional sidings upon it to accommodate the increased traffic." The mode in which the lands have been dealt with by digging the well, making the reservoir, erecting the smithy, and the conditions upon which the portions not then actually used were let, are all consistent with the reasonable belief existing that they would in all probability become necessary for the purpose of extending the accommodation at the station in question. It is true that in the case of *May* v. *Great Western Ry. Co.* (4), it appeared that a portion of the land there decided to be superfluous had been let at rents to the servants of the company or others, and upon similar terms cultivated by them; but it was originally acquired for the temporary purpose only of depositing spoil thereon, and as was said by Lord Hatherley (5): "It had been used for depositing spoil; it has performed its duty," and "was clearly land

(1) 9 H. L. C. 246. 6 Jur N.S. 1169 (3) Law Rep. 7 Q. B. 382.
(2) Law Rep. 2 H. L., Sc. 160. (4) Law Rep. 7 Q. B. 364.
(5) Law Rep. 7 H. L. 302.

1877

HOOPER v. GREAT WESTERN RAILWAY CO.

which was not required for the purpose of the railway;" and the Lord Chancellor (1) is reported to have said, "It was used for the temporary purpose, and only for the temporary purpose, of depositing spoil upon it. At the end of the ten years it was found as a plot of ground upon which spoil had been deposited, but upon which spoil had ceased any longer to be deposited; and there it lay, as a piece of ground, useless and unprofitable, having served the purpose for which it was taken, but having no longer, according to the case, any purpose to serve in connection with the railway," and elsewhere, he said (2), "In point of fact, so far as I can understand the statements in this case, it never was acquired by the company, and never was intended by the company to be acquired as to the whole of it for any permanent purpose." It is clear to me from the reasoning of the Lord Chancellor, that if that case had disclosed any facts shewing that there were purposes remaining unsatisfied, he would have considered the retention of the land justifiable. The reasoning of all the judges in the Court of Queen's Bench is strong to the same effect. Cockburn, C.J. (3), expressly says, "If looking to the surrounding circumstances of the company, and the present, I will not say immediately present, but still the proximate possibility within reasonable contemplation there shall be reasonable ground to believe that the land in question will become available for the purposes of the undertaking, it is not because there may not have been up to the moment of the expiration of the ten years, or at the actual moment of that expiration, an immediate application of the land to the purposes of the undertaking you are to shut your eyes to the fact that it will certainly become available for such purposes, and I think that under such circumstances it would be perfectly legitimate and proper to say that the land is still required for the purposes of the undertaking, and therefore is not superfluous land within the meaning of the section." Accepting, therefore, most completely the judgment and the reasoning of the Lords in the case of *Great Western Ry. Co.* v. *May*. (4) I am entirely satisfied that the decision in that case does not govern the facts of the present, and that the reasons assigned by the Lords who expressed

(1) Law Rep. 7 H. L. 297.
(2) Law Rep. 7 H. L. 296.
(3) Law Rep. 7 Q. B. 379.
(4) Law Rep. 7 H. L. 283.

their opinions therein, when rightly applied to the circumstances of the present case, afford very strong grounds in support of the opinion at which I have arrived that our judgment ought to be for the defendants.

MANISTY, J. This is a special case stated in an action of ejectment brought to recover possession of about thirteen acres of land in the parish of Westbury, in the county of Wilts, the same being part of nineteen acres of land purchased in the month of March, 1848, by the late Wilts, Somerset, and Weymouth Railway Company (now merged in and represented by the Great Western Railway Company, who are defendants in the present action), and the question is whether the thirteen acres of land, or any part of it, was superfluous land within s. 127 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), on the 3rd of August, 1863.

If any part of the thirteen acres was superfluous land, which ought to have been sold and disposed of as such before the 3rd of August, 1863, then it is admitted that the same became vested in the plaintiffs as adjoining owners on that day, and that they are now entitled to recover possession of it.

It was contended on behalf of the plaintiffs, first, that the land in question was acquired by the railway company under the compulsory powers of their special Act of 1846; and, secondly, that it was superfluous land within s. 127 of the Lands Clauses Consolidation Act, 1845.

On behalf of the defendants it was contended, first, that the land was acquired by the company under a voluntary agreement, and not under the compulsory powers contained in their special Act, in which case s. 127 of the Lands Clauses Consolidation Act would not apply; and, secondly, assuming the land to have been acquired compulsorily, still it was not and never had been superfluous land, within the meaning of s. 127 of the Lands Clauses Consolidation Act.

It was also contended by the plaintiffs, and denied by the defendants, that the case was governed by the judgment of the House of Lords in the *Great Western Ry. Co.* v. *May* (1).

(1) Law Rep. 7 H. L. 283.

1877

HOOPER v. GREAT WESTERN RAILWAY CO.

The Court has by consent the same power of drawing inferences as a jury.

The inference which I draw from the facts stated and found in the special case is, that no part of the thirteen acres of land sought to be recovered in the present action is now, or ever has been, superfluous land within the meaning of s. 127 of the Lands Clauses Consolidation Act, 1845. I adopt implicitly (as I am bound to do) the law as laid down by the House of Lords in the case of *Great Western Ry. Co.* v. *May* (1), but the facts in this case differ essentially from the facts in that case. The ratio decidendi in *May's* case was that the land in question had been acquired by the railway company for a temporary purpose only, which purpose had been fulfilled within the time prescribed for the sale of superfluous lands, and that neither at the expiration of that time or at any time had the land been required for any other purpose in connection with the railway. In the present case there is nothing to shew or lead to the conclusion that the land in question was not originally acquired and taken bonâ fide for the permanent purposes of the undertaking. Neither is their anything to shew that it was not retained under the honest belief that it would ere long be required for the permanent purposes of the undertaking, and it is found as a fact that from the year 1868 the whole of the land has been, and that it still is, required for the purpose of constructing additional sidings to accommodate the increased traffic on the company's railway at the Westbury station. The fact that the owners of the property sold, and the railway company purchased, the mines as well as the land in 1848 affords, in my opinion, some evidence that at that time both parties considered the property would be required for the purposes of the railway: see *Great Western Ry. Co.* v. *Bennett* (2), as to the right of the company to purchase mines compulsorily. I do not think the fact of the railway company having dealt with land and iron ore in the manner and subject to the restrictions and conditions mentioned in the agreements of 1849 and 1871 rebuts the inference to which I have just adverted.

It is contended on the part of the plaintiffs, that inasmuch as

(1) Law Rep. 7 H. L. 283. (2) Law Rep. 2 H. L. 27, 40.

the time limited for the completion of the railways authorized by the Act of 1846, expired on the 3rd of August, 1853, and consequently the time limited for the sale of the company's superfluous lands expired on the 3rd of August, 1863, and, inasmuch as the land in question had not been used except in the way already stated prior to the last-mentioned day, it then vested in the adjoining landowners, and that anything which has occurred subsequently is immaterial. Admitting, as I do, in accordance with the judgment of the House of Lords, in *May's Case* (1), that the 3rd of August, 1863, is the point of time in the present case at which a survey should be taken of the then position of the railway company, for the purpose of determining which of the lands (if any) acquired by them under their Act of 1846 were superfluous lands, I am of opinion that it is competent to a jury, when an action is brought to recover a part of such land as superfluous land, to take into consideration all the circumstances which have, as a matter of fact, taken place since that point of time and before the commencement of the action. It may be that if the question had been tried in 1863, the company would have found it difficult to satisfy a jury that the traffic on their railway would ere long increase to such an extent as to render the whole of the thirteen acres of land in question requisite for additional sidings at the Westbury station; but, in my opinion, it is too late for an adjoining landowner who does not bring his action till several years after the traffic has increased to that extent, and after the land is required for that purpose, to say that the defendants must have failed if the action had been tried in 1863, or between 1863 and 1868. Who can say what evidence could or would have been adduced or, à fortiori, who can say what verdict a jury would have found if the action had been tried in 1863? It seems to me that it would be a very harsh as well as an erroneous inference to draw from the facts stated and found in the special case, that the event, which actually occurred in 1868, could not reasonably have been contemplated and foreseen many years previously. It must be borne in mind that railway companies are only allowed to exercise their compulsory powers of purchase within a very limited

(1) Law Rep. 7 H. L. 283.

1877

HOOPER v. GREAT WESTERN RAILWAY CO.

space of time, and if they do not look a long way ahead and provide sufficient land for the future requirements of their undertaking, they are at the mercy of the adjoining landowners, or they must go to parliament at great cost for further compulsory powers. Traffic increases very slowly in many cases, and it certainly would be hard in the extreme, if in any particular case where the traffic has become developed more slowly than was expected, and the company has had to encounter unforeseen difficulties, they should be deprived of land bonâ fide purchased and retained in expectation of its being required for the permanent purposes of their undertaking, just when they are emerging from their difficulties and their expectations are on the eve of being realised; and that by an adjoining landowner from whom they would be compelled to repurchase it at his own price if he succeeded in recovering it. I am of opinion that there is evidence in the present case, which, if the action had been tried in the ordinary way must have been left by the judge to the jury, and upon which the jury might have found that the land was originally acquired for the permanent purposes of the undertaking, and that in August, 1863, there was reasonable ground for expecting and believing that it would ere long be required for those purposes. No doubt the length of time which elapsed between the purchase of the land in 1848 and the time (say, 1868) when the land was actually required for the purposes of the railway, coupled with the way in which the company let and dealt with it in the meantime, are facts to be taken into consideration; but they do not, in my mind, outweigh the other facts in the case. I think it must be assumed that the legislature would not in 1846 have granted the compulsory power to take the nineteen acres of land, without some proof that there was reasonable ground for supposing that it would be required for the purposes of the undertaking. And I think the fact that ever since 1868 it has been, and is still required for those purposes, is a cogent fact in favour of the defendants.

It seems to me that this is a stronger case in favour of the railway company than *Betts* v. *Great Eastern Ry. Co.* (1), which was cited in the course of the argument; and in giving judgment for

(1) Law Rep. 8 Ex. 294.

1877

HOOPER v. GREAT WESTERN RAILWAY CO.

the defendants, I do not think we shall in any respect decide contrary to *Great Western Ry. Co.* v. *May.* (1)

I abstain from going into the question whether the land was acquired by voluntary agreement or under the compulsory powers of the Act of 1846, because I think the defendants are entitled to judgment on the other ground, which I have so fully gone into.

Judgment for the defendants.

Solicitor for plaintiffs: *R. R. Nelson.*

Solicitors for defendants: *Field, Roscoe, & Roscoe.*

THE QUEEN *v.* THE INHABITANTS OF CENTRAL WINGLAND.

May 17.

Highway—Extra-Parochial Place—Indictment—Highway Parish—25 & 26 *Vict. c.* 61, *s.* 32—"*Purposes of this Act*"—"*Parish separately maintaining its own Highways.*"

The 32nd section of 25 & 26 Vict. c. 61, does not subject places formerly extra-parochial parishes to the common law liability to indictment for non-repair of highways. It only subjects them to the operation of that Act as highway parishes liable to be put into a highway district.

THIS was an indictment for non-repair of a highway.

The admissions, which were agreed to on both sides at the trial, were as follows:—

Prior to the passing of the Nene Outfall Act, 1827, all the lands which now form Central Wingland were unreclaimed salt marshes, and extra-parochial. Pursuant to the Nene Outfall Act, 1827, the lands were embanked and reclaimed, and by s. 176 of the Act they were declared to be extra-parochial. Sect. 180 of the same Act provided that the surveyor appointed under the Act should set out so much of the lands as he thought proper for public roads and highways. He made his award on the 30th of December, 1836, setting out, amongst others, the road in question as a public highway.

The Nene Outfall Commissioners under the Act became owners of Central Wingland, and on the 20th of August, 1840, they sold

(1) Law Rep. 7 H. L. 283.

1877

THE QUEEN v. WINGLAND.

by auction, under conditions of sale, a portion of those lands adjoining the road in question. Under the 9th condition, the purchasers were required to enter into covenants to repair the road proportionately to their frontage on it. They accordingly entered into such covenants.

Since the passing of 20 Vict. c. 19, Central Wingland has been added to the Holbeach Union by an order of the Poor-Law Board, dated the 2nd of May, 1866, and an overseer and a guardian have been appointed from time to time. In May, 1875, a surveyor of highways was appointed for Central Wingland by justices. It was contended, however, by the defendants that the appointment was invalid.

Central Wingland is not a highway district, and no highway board has been appointed of any district in which Central Wingland is included. No highway rates are made for Central Wingland. The road in question is now and has for some time been out of repair. In January, 1876, the prosecutor took out a summons against the surveyor in respect of the non-repair of the road. The justices on the hearing directed an indictment.

On these facts the verdict was entered for the Crown, leave being reserved to move to enter it for the defendants on the following grounds: 1st, that on the facts the defendants were entitled to the verdict; 2ndly, that the justices had no power to appoint a surveyor, or to constitute the parish a highway parish, the same not being in a highway district; 3rdly, that the Nene Outfall Act provides that Central Wingland shall at all times be extra-parochial, and the said Act is not repealed by the subsequent general Acts; 4thly, that the provisions of 5 & 6 Wm. 4, c. 50, s. 23, have not been complied with.

An order nisi having been obtained accordingly,

Merewether, Q.C., and *Dugdale*, shewed cause. The 20 Vict. c. 19, only makes extra-parochial places parishes for poor law and certain other purposes, but not for highway purposes. But 25 & 26 Vict. c. 61, s. 32, enacts that when a place has become a parish for the purposes mentioned in 20 Vict. c. 19, it shall "for the purposes of this Act be deemed to be a parish separately maintaining its own highways." The 25 & 26 Vict. c. 61, is to be

read as one Act with the old Highway Act, 5 & 6 Wm. 4, c. 50, and "the purposes of this Act," therefore, mean the purposes of the repairs of the highways generally. The inhabitants are consequently subject to be indicted for non-repair.

The intention of 25 & 26 Vict. c. 61, as expressed in the Act itself, is to provide for the better repair of the highways throughout the county, and it cannot have been intended that the provisions of s. 32 should only apply where there is a highway district. The purposes of the Act, 25 & 26 Vict. c. 61, are not confined to the formation of highway districts.

Graham, supported the rule. The "purposes of this Act" in the 32nd section means the purposes of 25 & 26 Vict. c. 61. The expression is not "the purposes of these Acts," which would have been the natural expression if the intention had been as contended for by the Crown. There is nothing whatever in the section or the Act to make an extra-parochial place indictable for non-repair. All that is meant is, that a place of this description may be put into a highway district. It is a highway parish when such district is formed, but not before: see 27 & 28 Vict. c. 101, s. 3. It is not made a common law parish for highway purposes. It would be most inequitable if, when there was no highway district, a place of this sort could be indicted, because then it would not have the benefit of 25 & 26 Vict. c. 61, s. 34, by which, where any person in the place is liable to repair by reason of tenure or otherwise howsoever, the board of the district may order the surveyor to repair the road, and the person may be summoned before the justices, and ordered to pay the cost of repair. The meaning of the expression "a parish separately maintaining its own highways," is shewn by the 5th section of 27 & 28 Vict. c. 101, from which it appears that it means not a common law parish, but a place where there are no highways repairable by the inhabitants, or where the highways are repaired by some person ratione tenuræ, or otherwise.

MELLOR, J. I am of opinion that the rule should be made absolute. The case is one of some complexity, depending on various Acts of Parliament. The question is, whether the intention of the sections to which our attention has been called was to

1877

THE QUEEN v. WINGLAND.

impose the liability contended for by the Crown on this place, or merely to provide an improved machinery for enforcing the repairs of the highways. The contention on behalf of the Crown is that the defendants are liable to an indictment; but we do not consider that that proposition is made out. These lands were originally extra-parochial, and there was no obligation on the inhabitants to repair the highways. Accordingly the expedient was adopted, when the lands were sold, of putting the purchasers under the obligation of repairing proportionately to their frontages upon the highways. Subsequently by the operation of 20 Vict. c. 19, for certain purposes these lands become a parish. But highway purposes are not among the purposes specifically enumerated in that Act, and consequently no obligation to repair the highways was created by it. But then, it is contended, that the effect of the subsequent Act, 25 & 26 Vict. c. 61, s. 32, is to create this obligation, and to render the inhabitants indictable for neglect of it. This depends on the meaning of the words "for the purposes of this Act" in the section. Now, the general scheme of the Act is to frame new machinery for the carrying out of the repair of the highways. But the mode in which this is done is by making a district composed of several parishes and places. The purposes of the Act, therefore, are the matters incident to the formation of such district. It does not seem to me that by this expression the general subject of repair of highways is contemplated, but merely the particular machinery created by the Act. The intention was to make provision for cases in which there might be a difficulty in carrying the provisions of the Act into effect by reason of places being extra-parochial. It being important that new arrangements should be made and extensive districts be formed throughout the country for highway purposes, it was provided that the fact of places being extra-parochial, and therefore not liable as parishes for the repair of the highways, should not prevent their being put into highway districts. If so put into districts they are to be entitled to appoint a waywarden, and to take part in the general business of the district. It seems to me that the words used are abundantly satisfied by being thus construed. The onus lies on the Crown of shewing us that it was intended by them to turn an

extra-parochial place into an ordinary parish for general highway purposes and impose upon it all the liabilities of a parish for such purposes. I cannot come to the conclusion that this was the intention. Such a construction, to my mind, goes beyond the natural meaning of the words. For these reasons I see nothing in these Acts authorizing an indictment against the defendants for the non-repair of the highway, and our judgment must, in my opinion, be for the defendants.

FIELD, J. I am very clearly of the same opinion. The indictment states that the highway in question was in the parish of Central Wingland, and that the inhabitants ought to repair the same.

This form of indictment is based upon the common law presumption that a parish is bound to repair the highways within it. It was necessary, therefore, for the prosecution to prove that Central Wingland was a parish. It was not a parish for any purpose before 20 Vict. c. 19. [Before that it was an extra-parochial place, and no liability rested on the inhabitants in respect of the repair of the highways. There were then a great many other places in the same position. This was found to be a great evil, and the Act of 20 Vict. c. 19, was passed to put these places in the position of parishes, so far as poor-law and certain other liabilities were concerned, but not for highway purposes. Subsequently to this the legislature determined to create a new machinery for the repair of highways. The object was not to alter the liabilities that existed before, but to provide a new mode of repairing. The advantage of this new machinery consisted in grouping together larger areas, and the chain of communication might, in cases such as the present, have been broken by extra-parochial places. The legislature therefore thought it wiser to include them in the scheme. Having already provided a machinery by which funds might be raised in such places for the relief of the poor, they proceeded, in 25 & 26 Vict. c. 61, s. 32, to shew how they might be brought into the general system of highway districts. The words are, "shall for the purposes of this Act be deemed to be a parish, separately maintaining its own

1877

THE QUEEN v. WINGLAND.

highways." At first sight I was struck with these words "separately maintaining," which seem to have no meaning as applied to a parish in the ordinary sense, but to be appropriate rather to townships or portions of parishes.

But Mr. Graham drew my attention to s. 5 of the subsequent Act, 27 & 28 Vict. c. 101, which seems exactly to apply to the case of Central Wingland; and reading s. 32 of 25 & 26 Vict. c. 61, by the light of that section, I think it is clear that when s. 32 speaks of "the purposes of this Act," it does not mean the purposes of the Highway Acts generally, but the purposes of 25 & 26 Vict. c. 61 only. Mr. Merewether urged that the purpose of that Act was generally to get the highways better repaired; that is so, but that is the ultimate object, not the particular and immediate object, which was to provide a machinery by which that improvement was to be procured. The intention seems to me to be to make these places highway parishes. The effect is, that they are within the general scheme of the legislation with regard to highway districts. They may be put into such a district, and then will have a waywarden and be represented upon the highway board; and they can then obtain the benefit of s. 34 of 25 & 26 Vict. c. 61, for they will have a remedy against any person in the place who for any reason is liable to repair the highways. These seem to have been the objects of s. 32, but I cannot see that there was any intention to impose upon these places the common law liability to indictment for non-repair of the highways.

Order absolute.

Solicitors for prosecution: *Baxters.*
Solicitor for defendants: *Mossop.*

WOOLFE *v.* HORNE AND ANOTHER.

1877
May 11.

Auctioneer—Personal Liability—Conditions of Sale—Delay in clearing Goods within prescribed Time—Condition Precedent.

In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues, headed "Great Western Railway Company. Catalogue of unclaimed property, &c., which will be sold by auction by Messrs. H. & E. (the defendants), on Tuesday, November 7th, and following day. By order of the directors of the above company, &c." The catalogue contained, amongst others, the following conditions: "The lots to be cleared away within three days after the sale at the purchaser's expense, &c. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale without further notice, and the deficiency made good by the defaulter."

The plaintiff attended the sale, received a catalogue, bought one of the lots, and paid a deposit. He did not fetch the goods away on Saturday (the last of the three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendants' possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. The plaintiff having been nonsuited:—

Held, first, that on the face of the catalogue and conditions, there was evidence that the defendants contracted personally with the plaintiff for the delivery of the goods purchased by him. Secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery.

THIS was an action in the Mayor's Court of London to recover damages for the non-delivery of goods sold by the defendants to the plaintiff.

At the trial before Mr. Brandon, the registrar, evidence was given that the defendants, Messrs. Horne & Eversfield, were auctioneers, and that they issued printed catalogues of goods to be sold by auction. Each catalogue was headed "Great Western Railway. Annual clearance sale. Catalogue of the left and unclaimed property, &c., &c., which will be sold by auction by Horne, Eversfield & Co., at the Goods Warehouses, Paddington, on Tuesday, November 7th, 1876, and following day, at 11 o'clock precisely each day. By order of the directors of the above com-

1877

WOOLFE v. HORNE.

pany. May be viewed the day previous. Catalogues had on the premises, and of the auctioneers, 7, Great George Street, &c."

The catalogue also contained conditions of sale, of which the following are material:—

"The lots to be cleared away within three days after the sale, at the purchaser's expense, with all faults and defects, and without any allowance for error in description. If any deficiency shall arise, or from any cause the auctioneers shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation for the same, to be calculated in proportion to the purchase-money for the whole lot.

"Upon failure of complying with the above conditions the money deposited in part payment shall be forfeited; all lots uncleared within the time aforesaid shall be re-sold by public or private sale without further notice, and the deficiency (if any) attending such re-sale, together with all charges and expenses attending the same, and arising from the non-removal of the lots within the time specified, shall be made good by the defaulter at this present sale."

The plaintiff, on Wednesday the 8th of November, attended the sale, received a catalogue, and bought lot 542, consisting of a quantity of rags, at so much per cwt., and paid the deposit. Rags were goods which required weighing, and such goods were not delivered till after the small lots. Being of the Jewish persuasion he did not go on Saturday to fetch the goods, but went on Monday to the warehouse and saw Eversfield, one of the defendants, and said he had come to clear the lot. Eversfield said that the goods had been taken away a day or two before. He gave the plaintiff an order on the foreman for the delivery of the lot, which the foreman was unable to comply with, owing to its removal. A witness said that between ten and eleven on Saturday morning he went to clear goods which he had bought at the sale, and saw lot 542, part of which lay in the warehouse and part was on a trolly; and another witness stated that a servant of the defendants said that he would not deliver any weighed goods until Monday.

It was objected that the defendants were not liable, for they sold as agents for the Great Western Railway Company, and the

catalogues disclosed their principals. Secondly, that the contract was to deliver on the purchaser clearing away his goods within three days, and that, as the plaintiff did not present himself or was ready to clear the goods within the three days, there was no breach. Other objections were taken to which it is unnecessary to refer.

The plaintiff was nonsuited, with leave to move to enter the verdict in his favour for 5*l.* 12*s.* 6*d.*

An order having been obtained calling on the defendants to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff for 5*l.* 12*s.* 6*d.* on the ground that there was sufficient evidence to support the plaintiff's case, and that there was nothing in the conditions of sale to prevent the plaintiff's recovering in the action,

A. Cock, shewed cause. The nonsuit was right. *Hanson* v. *Roberdeau* (1) decides that an auctioneer, who sells a commodity without saying on whose behalf he sells it, may be personally liable on the contract of sale, but Lord Kenyon expressly states that where the auctioneer names his principal, he is not liable. *Franklyn* v. *Lamond* (2) is in accordance with this decision, for there it was held that upon a sale of shares by auction, without disclosing the name of the principal, the mere fact that the defendants were described in the catalogue as "auctioneers" was not such an indication of agency as to free them from liability. *Evans* v. *Evans* (3) is directly in favour of the defendants. There there was a letting by auction of premises "subject to the following conditions. By Messrs. Evans & Thomas, auctioneers. (2.) The rent is to be paid into the hands of J. Evans or J. Thomas, auctioneers, or to their order"; and at the bottom of the conditions was written, "Approved of the above conditions by me, D. Jones." It was held that these conditions imported a letting by Jones, Evans & Thomas acting as his agents. In one of the latest cases, *Mainprice* v. *Westley* (4), where the auctioneer advertised premises for sale by auction by W. (the auctioneer) "by direc-

(1) Peake, N. P. C. 163.
(2) 4 C. B. 637; 16 L. J. (C.P.) 221.
(3) 3 Ad. & E. 132.
(4) 6 B. & S. 420; 34 L. J. (Q.B.) 229.

1877

WOOLFE v. HORNE.

tion of the mortgagee, with a power of sale," &c. "For further particulars apply to Mr. H., solicitor, or to the auctioneer," it was again held that there was no personal contract by the auctioneer that the premises should be knocked down to the highest bidder, and that the contract, if any, was with H. The words in the catalogue in the present case, "by order of the directors of the above company," the catalogue being already headed "Great Western Railway," are a sufficient disclosure of the defendants' principals.

[FIELD, J., referred to the later case of *Fisher* v. *Marsh* (1), where the auctioneer was held entitled to sue, and where it is laid down that even where the principal is known, a contract in writing may be made by an agent with a third person on such terms that the agent is personally bound to fulfil it.]

Secondly, the plaintiff did not comply with the conditions by claiming the lot within the prescribed time, and has forfeited his right to it. Money paid upon a condition which has not been complied with cannot be recovered back: *Hardingham* v. *Allen*. (2)

Wildey Wright, in support of the rule. *Evans* v. *Evans* (3) is distinguishable. There the principal affixed his name to the contract, as one of the contracting parties. Here, the dealing was exclusively with the defendants. Secondly, the non-compliance with the conditions of sale as to clearing the goods did not affect the plaintiff's right of action. In *Saint* v. *Pilley* (4), where there was a similar clause as to the removal, within a particular time, of fixtures sold by auction, it was held that the purchaser did not lose his title to them by allowing them to remain over the time on the premises, during his negotiations for a lease.

MELLOR, J. I am of opinion that the verdict must be entered for the plaintiff. The general doctrine with regard to the authority of auctioneers is laid down in the case of *Williams* v. *Millington* (5) by Lord Loughborough, who says: "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is

(1) 6 B. & S. 411; 34 L. J. (Q.B.) 177.
(2) 5 C. B. 793.
(3) 3 Ad. & E. 132.
(4) Law Rep. 10 Ex. 137.
(5) 1 H. Bl. 81, at pp. 84, 85.

no difference whether the sale be on the premises of the owner, or in a public auction room, for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay." Now, it was conceded by the counsel for the defendants that an auctioneer is entitled to sue for the price of goods which he has put up to auction; but it was contended that an auctioneer is no more a contracting party and no more liable to be sued than a broker or any other kind of agent. But, having regard to the general doctrine which I have stated, and to the conditions of sale by which the auctioneer undertakes to deliver the goods, and particularly to the condition by which, in case the auctioneers are unable to deliver any lot, the purchaser is to accept compensation, I think that in the present case the auctioneer is responsible for his neglect to deliver.

Then it was contended that the plaintiff had not complied with the conditions of sale as to the removal of his lot within three days, and that he had, therefore, no right of action. My answer to this objection is that these stipulations cannot be looked upon as conditions precedent. I cannot think that the mere fact that the purchaser did not present himself till Monday morning deprived him of the right to claim his goods. I think, therefore, the action was properly brought against the auctioneers, and that the conditions afford them no defence.

FIELD, J. I am of the same opinion. The action is brought by the plaintiff against the defendants upon an alleged contract that, if he would buy certain goods from them and pay a deposit, they would deliver the goods to him. At the trial these facts were proved: The defendants acted as auctioneers for the Great Western Railway Company in the sale of goods left with the company by travellers and never claimed. The plaintiff went to the sale and bought a lot of rags, which are heavy goods and required weighing. He paid the deposit according to the terms of a catalogue by which the sale was made. By one of the con-

1877

WOOLFE v. HORNE.

ditions of this catalogue every lot was to be cleared away within three days after the sale, and upon failure of complying with the above condition the deposit was to be forfeited and the lot resold by public or private sale. The plaintiff says, that being of the Jewish persuasion, he did not go on the Saturday, the last of the three days, but went on the Monday. When he got to the warehouse he found that on the previous Saturday his lot had been delivered to some one else and another lot substituted, and the goods were never, in fact, delivered to him. It seems that on the Saturday morning part of the goods were seen upon the warehouse and part on a trolly. Now, was there evidence to go to the jury in support of the plaintiff's case? For if there was, the nonsuit was wrong. In the first place, the fact that the goods were seen on the trolly was evidence that they were then ready for delivery. Another witness stated that the defendants' servant said that he would not deliver any weighed goods till Monday. The question whether the defendants entered into a contract to deliver is a question of fact. We have, first, the fact that the defendants are auctioneers. It has been argued that auctioneers are merely in the position of brokers or agents. This may or may not be the case, according to circumstances. It must be remembered that, according to *Williams* v. *Millington* (1) auctioneers have much larger rights than ordinary agents. The actual delivery of the goods is intrusted to them; they have a lien upon the goods for the charges, and their possession of the goods is complete till delivery. Now, assuming the defendants could have sued the plaintiff for the price of these goods, had not the plaintiff a correlative right to sue them for the non-delivery? The goods, it is clear, could not have been delivered without an order from the defendants, and I think that there is abundant evidence that they were the persons who made the contract.

Secondly, it was argued that punctuality in clearing the goods was a condition precedent to the right to claim delivery. But to make these stipulations conditions precedent, it is necessary that they should go to the whole root of the consideration. I do not think that they go so far. If the goods were to have been cleared before 12 o'clock on Saturday, it never could be supposed that

(1) 1 H. Bl. 81.

the plaintiff would lose his right to them by coming half an hour too late. No doubt there is an implied agreement, for the breach of which the purchaser is liable, but it is not a condition precedent.

1877

WOOLFE v. HORNE.

Order absolute.

Solicitor for plaintiff: *H. W. Cattlin.*
Solicitors for defendants: *Farlow & Jackson.*

KARET *v.* THE KOSHER MEAT SUPPLY ASSOCIATION, LIMITED.

May 11.

Bills of Sale Acts (17 & 18 *Vict. c.* 36) (29 & 30 *Vict. c.* 96), *s.* 4—*Renewal of Registration of Bill of Sale—Assignment by Grantee of Interest under Bill of Sale.*

The Act 29 & 30 Vict. c. 96, s. 4—which requires the registration of a bill of sale under 17 & 18 Vict. c. 36 to be renewed every five years, in default of which the registration ceases to have any effect—is equally imperative when the grantee, before the period for renewal, assigns his interest under the bill of sale to a third person; and the assignee, if the registration is not renewed, has no title as against an execution creditor.

1. CASE stated for the opinion of the Court pursuant to an interpleader order.

2. On the 19th of January, 1871, G. Brown, for valuable consideration, made a bill of sale in favour of G. Marks of household furniture, stock-in-trade, fixtures, fittings, and utensils in trade, goods, chattels, and other effects more particularly specified in the schedule to the bill of sale.

3. The provisions of the Act 17 & 18 Vict. c. 36 (1), as to

(1) 17 & 18 Vict. c. 36, s. 1: "Every bill of sale of personal chattels made after the passing of this Act—shall, together with an affidavit, &c., of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, &c., be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale,—otherwise such bill of sale shall, as against all assignees in bankruptcy of the person whose goods are comprised in the bill of sale, and as against all sheriff's officers seizing the property in execution, be null and void to all intents and purposes whatsoever," &c.

By 29 & 30 Vict. c. 96, s. 4, the registration of a bill of sale under the principal Act (17 & 18 Vict. c. 36) shall, during the subsistence of such security, be renewed in manner hereinafter mentioned once in every period of

1877

KARET. v. KOSHER MEAT ASSOCIATION.

registration, were duly complied with as to the bill of sale, and were so complied with within twenty-one days of the making or giving thereof, but the registration thereof has not since been renewed.

4. On the 10th of February, 1875, an indenture was duly, and for valuable consideration, made between Marks and the plaintiff A. Karet, whereby it was witnessed that Marks assigned unto Karet the household furniture, stock-in-trade, fixtures, fittings, and utensils in trade, goods, chattels, and effects comprised and described in the schedule to the bill of sale above-mentioned, and all the estate and interest of Marks therein or thereto.

5. The indenture of the 10th of February, 1875, was never registered.

6. On the 1st of May, 1876, the above-named defendants obtained and signed judgment in this court against Brown for 35*l.* 12*s.*

7. On or about the 30th of May, 1876, the household furniture, stock-in-trade, fixtures, fittings, and utensils in trade, goods, chattels, and effects comprised and described in the schedule to the bill of sale above-mentioned, or some portion thereof, were seized by the sheriff of Middlesex under a fi. fa. issued upon the judgment for the levy of 35*l.* 12*s.*, and the usual charges and expenses.

8. The plaintiff, on the 1st of June, 1876, sent a notice to the sheriff claiming the whole of the goods, chattels, and effects so seized as aforesaid.

9. The whole of the goods so seized were at the time of the seizure in the actual and apparent possession of Brown.

10. The goods described and comprised in the schedule to the

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five years, commencing from the day of the registration, and if not so renewed such registration shall cease to be of any effect at the expiration of any period of five years during which a renewal has not been made as hereby required—

By s. 5, the registration of a bill of sale shall be renewed by some person filing in the office of the Masters of the Court of Queen's Bench (being the officers acting as clerk of the docquets and judgments in the said court) an affidavit stating the date of such bill of sale, and the names, residences, and occupations of the respective parties thereto as stated therein, and also the date of the registration of such bill of sale, and that such bill of sale is still a subsisting security, &c.

bill of sale were, at the time of the making of the indenture of the 10th of February, 1875, and have been ever since until and at the time of the seizure, in the actual and apparent possession of Brown.

12. Upon the making of the interpleader order the sheriff withdrew from possession. Brown has subsequently become bankrupt, and the defendant company is being wound up pursuant to the provisions of the Companies' Acts, 1862 and 1867.

The question for the opinion of the Court is whether, at the time of seizure by the sheriff as above stated, the household furniture, stock-in-trade, fixtures, fittings, utensils in trade, goods, chattels, and effects comprised and described in the schedule to the bill of sale were the property of the plaintiff as against the defendants.

Dodd, for the plaintiff. No authority upon the present question can be found; but it will be conceded that the assignment was valid at the time when it was made, and there are no express words in the Act, 29 & 30 Vict. c. 96, which require the assignee of a bill of sale to register the assignment, and he ought not to be required to renew the registration of the making of the bill of sale, a transaction to which he was no party.

[FIELD, J. The object of the Act is that creditors may know whether their debtor has parted with his goods. It is nothing to them whether the grantee has or has not assigned his interest under the bill of sale.]

In Benjamin on the Contract of Sale, 2nd ed. p. 396, the learned author, after referring to 29 & 30 Vict. 96, says: "Neither the statute of Elizabeth nor the Bills of Sale Act renders the contract void between the parties.—Even as to creditors such conveyances are not void, but voidable, and the creditors must as in all analogous cases, elect whether they will treat their debtors' conveyance as valid or defeasible. If the transferee makes a conveyance to a third person bonâ fide, for a valuable consideration, before the bill of sale is impeached by creditors as being in fraud of their rights, the title of such third person will not be disturbed." *Morewood* v. *South Yorkshire Ry. Co.* (1) shews that although a bill of sale as

(1) 3 H. & N. 798; 28 L. J. (Ex.) 114.

1877

KARET v. KOSHER MEAT ASSOCIATION.

between the grantor and grantee is a fraud on the grantor's creditors, yet, if the grantee, with the sanction of the grantor, assign his interest in the goods to another for good consideration and bonâ fide, the assignment is valid as against the creditors. The principle is that it is too late to avoid a voidable transaction, when a third person has bonâ fide acquired an interest under it.

Horne Payne, for the defendants. The construction which it is proposed to put upon 29 & 30 Vict. c. 96, would defeat the operation of the enactment.

[MELLOR, J. It must be contended that in a case where the grantee does not register within twenty days of the bill of sale, the law not compelling him to register within that time, and then assigns his interest within the twenty days, that no registration whatever is required.]

The passage in Benjamin on Sales, has no application, for it refers only to transactions voidable on the ground of fraud. The assignee claims the goods under the original bill of sale, and must be taken to have notice of all that is required to make it valid.

MELLOR, J. I think that our judgment must be for the defendants, on the ground that the facts bring the case within the mischief intended to be prevented by the Bills of Sale Act. The preamble of the Act, 17 & 18 Vict. c. 36, recites "that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." Sect. 1 then requires that to make a bill of sale operative it shall be registered in a particular manner within twenty-one days after it is made, in order that all persons who give credit to the grantee may have the opportunity of knowing that he has conveyed away his property. The present case, so far as I am aware, has not occurred before. It seems that Brown made a bill of sale of his furniture to Marks, that the bill of sale was duly registered before the twenty-one days, and that four years afterwards Marks assigned his interest to the plaintiff. The Act,

29 & 30 Vict. c. 96, s. 4, requires the registration of a bill of sale under 17 & 18 Vict. c. 36, to be renewed once in every five years. In the present case the five years have elapsed without the registration being renewed. The grantor always remained in possession of the goods, and there is nothing to take the case out of the statute, except the fact that the grantee had executed an assignment of his interest, and that the Act does not in terms require the assignee to register. But I cannot think that this is of the slightest consequence. To adopt the plaintiff's construction would entirely get rid of the provisions of the statute, for where, as here, the grantee made an assignment, the grantor would go on obtaining credit, and his creditors would have no protection.

FIELD, J. I am of the same opinion. The Bills of Sale Act, 17 & 18 Vict. c. 36, whether wisely or not is not for us to say, enacts that every grantor of a bill of sale shall give notice to all the world, by means of registration, that he has parted with his goods to some other person, and that the goods which are in his possession have practically ceased to belong to him. It is therefore enacted that every bill of sale which does not give this information shall, as against the grantor's execution creditors, be void. In the present case the question is whether certain goods which were in the possession of the grantor are the property of the plaintiff. Originally the registration required by the Bills of Sale Act was available for all time, but by 29 & 30 Vict. c. 96, s. 4, it ceases to have any effect after five years. But it is argued that inasmuch as the grantee of the bill of sale has bonâ fide conveyed his interest to a third person, the defect in the registration is immaterial. As a general proposition, any one acquiring the possession of goods cannot have a better title than the person who grants to him. Is the present case an exception? I think to hold that it is would go far towards repealing the Act of Parliament. Mr. Dodd has founded an argument upon a supposed analogy between the statute 13 Eliz. c. 5, and the present Act, and contends that a transaction voidable between the original parties cannot be avoided after there has been a bonâ fide conveyance for value to a third person. The two cases are quite

1877

KARET v. KOSHER MEAT ASSOCIATION.

different. In the case supposed the bonâ fide assignee has no notice of the fraud. Here the plaintiff became assignee with full notice that unless the registration was renewed after five years, it would be of no effect.

Judgment for the defendants.

Solicitors for plaintiff: *Chapman & Lee.*
Solicitors for defendants: *Harris & Godwin.*

April 25.

THE QUEEN *v.* CUMBERLEGE AND OTHERS.

Special Payment to Vestry Clerk — Valuation List—Extraordinary Duties—Disallowance by Poor Law Auditor — Union Assessment Committee Act, 1864 (27 & 28 *Vict. c.* 39) *s.* 7; *Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 6, 7— *Vestry Clerks Act* (13 & 14 *Vict. c.* 57) *s.* 7.

A special payment made by the vestry of a metropolitan parish to the vestry clerk, and ordered to be charged upon the poor rate, for preparing the valuation list required by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), was disallowed by the poor law auditor, on the ground that the preparation of the list was among the statutory duties of the vestry clerk, for which he was remunerated by salary, and because the charge was excessive, there being nothing to shew the payment to any person of any part of that sum:—

Held, that the disallowance must be quashed, for there was nothing in the Vestry Clerks Act (13 & 14 Vict. c. 57) to shew that the preparation of the valuation list was among the general duties of the vestry clerk, and that, with regard to the alleged excess in the charge, the claim of the vestry clerk was not limited to his expenses, and it did not appear that the amount paid was not a reasonable allowance for his work and outlay.

RULE to quash the disallowance, by the poor law auditor of the Metropolitan Audit District, of 100*l.* charged in the accounts of the vestry of St. Paul's, Covent Garden, as a payment to their vestry clerk for preparing the valuation list required by 32 & 33 Vict. c. 67. (1)

(1) The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), incorporates the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), and the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39).

By s. 6: "The overseers of every parish to which this Act extends within the time in this Act mentioned shall make and sign a valuation list of their parish in duplicate in accordance with this Act."

By s. 7: "After the valuation list is signed by the overseers the same pro-

1877

THE QUEEN v. CUMBERLEGE.

The facts and arguments sufficiently appear in the judgment.

April 21, 1877. Before Lush, J.

A. Glen (*McIntyre, Q.C.*, with him) shewed cause, and referred (with regard to the illegality of attempting to charge gratuities upon the poor rates) to *Ex parte Mellish* (1); *Rex* v. *Gwyer* (2); *Rex* v. *Glyde.* (3)

A. Wills, Q.C. (*Glyn* with him), in support of the rule, referred to the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), s. 7; the Vestry Clerks Act (13 & 14 Vict. c. 57), s. 7; and (as to the sanction of the vestry being sufficient) to *Reg.* v. *Chorlton on Medlock.* (4)

Cur. adv. vult.

April 25. LUSH, J. This is a rule to quash the disallowance by the poor law auditor of the Metropolitan Audit District of a sum of 100*l.* charged in the accounts of the vestry of St. Paul's, Covent Garden, as a payment made to their vestry clerk for preparing the valuation list required by 32 & 33 Vict. c. 67, and the surcharge of that sum upon the members of the committee who authorized the alleged illegal payment.

The reasons stated by the auditor for the disallowance are: "That the work came within the official duties imposed upon vestry clerks by statute, and for which they are therefor remunerated by the salary assigned to them, and because 100*l.* is an excessive charge, no statement of particulars with vouchers of

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ceedings shall be had as are directed by the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), ss. 17, 18, 19, 20, 21, subject to the alterations made by this Act."

By the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), s. 7: "When the overseers of any parish incur any expense in making out any valuation list or supplemental list, or in revising or valuing any of the rateable hereditaments of such parish under the provisions of the Union Assessment Committee Act, 1862, with the consent of the vestry given by express resolution, after due notice, they may charge such expense, so far as the same may be authorized by the vestry upon the poor-rate," &c.

(1) 8 L. T. (N.S.) 47.
(2) 2 Ad. & E. 216.
(3) 2 M. & S. 323.
(4) 1 Q. B. D. 62.

1877

THE QUEEN v. CUMBERLEGE.

payments having been produced with regard to the payment of any part of such sum to any other person."

The 7th section of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), enacts, that "when the overseers of any parish incur any expense in making out any valuation list," &c., "with the consent of the vestry, given by express resolution, after due notice, they may charge such expense, so far as the same may be authorized by the vestry, upon the poor-rate."

The first resolution passed by the vestry on the subject, appointed the churchwardens and overseers a committee for the purpose of preparing the valuation list, 1875, assisted by the vestry clerk, and the committee were thereby authorized to employ such assistance as they might deem necessary for that purpose. It is stated by the vestry clerk in his affidavit, and is not questioned, that at the time the resolution was come to, he received from the vestry definite instructions to prepare the said list on behalf of the committee, and to do all such things as might be necessary, and to employ such assistance as he might think needful in the matter, for saving the committee labour and time in connection therewith, and to bring forward the subject of his remuneration therefor at a future time, when the vestry would be in a position to judge of the amount and value of the labour performed by him in the matter.

After the list was made, which, as appears by the affidavit, involved a considerable amount of labour and expense, the vestry passed the following resolution:—"That this vestry hereby acknowledging that the expenses incurred, and labour bestowed by the clerk to this vestry, of and occasioned by and incident to and incurred in making the valuation list 1875, for this parish, were incurred, undertaken, and bestowed with the consent, by the directions, and under the authority of this vestry, by virtue of its express resolution for such purpose so intended, come to at a vestry meeting held on the 10th day of April last, after due notice given, hereby expressly resolve that the sum of 100*l.* be paid to Mr. John C. Button, the clerk to this vestry, as special remuneration to him in respect of such his expenses and labour, and this

vestry authorizes such sum to be charged upon the poor-rate of this parish."

These resolutions satisfy all the requirements of the 7th section of the Act. The expense was incurred with the consent of the vestry, given by express resolution after due notice, and the amount charged is the precise amount authorized by the vestry to be paid. The question, therefore, is, whether the duty of preparing the valuation list is a duty attaching to the office of vestry clerk as such, for if it is, the payment of 100*l.*, or any part of it, for the service was a mere gratuity, and the vestry had no authority to charge it upon the poor-rate. As no duties other than those prescribed by the Vestry Clerks Act (13 & 14 Vict. c. 57), have been imposed on the vestry clerk of this parish, we must look to the 7th section of that Act in order to determine whether this particular work is included, either in terms or by reasonable intendment, within the range of his duties. That section requires him, among other things, to "make out, when required by the vestry, the church-rate, and procure the same to be signed and completed, and where there is no collector of poor-rates or assistant overseer to make out the poor-rate and procure the same, to be allowed and to make all the subsequent entries in the rate books, and to give the notices thereof required by law." Also "to assist the churchwardens or overseers in preparing and making out all other parochial assessments and accounts, and in examining the accounts of the collectors of such assessments."

These are the only words to be found in the Act upon which an argument can be founded, and I think it is plain that they do not bear the construction contended for. The valuation list is not an "assessment," which in this clause is evidently used as synonymous with "rate." It is only a draft or proposal, which, when adopted and settled by the assessment committee, is to become the basis of an assessment. That the word "assessment" could not have been intended to include a valuation list is clear, for no such thing had been thought of at the time the Vestry Clerks Act passed. The work in question is, in truth, a new duty imposed by the Assessment Committee Act, not a substitute for, but an addition to, the former duties of overseers for which no provision is made other

1877

THE QUEEN v. CUMBERLEGE.

than this that the overseers are responsible for its being done, and are authorized to charge the expense of doing it upon the poor-rate. It is of course implied that the expense they incur must be reasonably proportioned to the service they require. It is the duty of the auditor to see that the authority to charge is not made a pretext for extravagance or favouritism. Nothing of the kind is suggested here, nor does the auditor find that the amount allowed by the vestry is more than the services required and performed are fairly worth, or than the vestry would have had to pay if they had employed a stranger. His reason for disallowing is that it was part of the duty of the vestry clerk to do it, and that it was included in his salary. In this I am of opinion that he was mistaken.

His reason for not allowing even the expenses out of pocket might have been sufficient if the vestry clerk were entitled only to what he had been obliged to expend. But they are not put forward as a separate charge, and they were taken into account by the vestry in assessing the gross sum, and there is nothing to shew that that was not a reasonable allowance to cover both the work and the outlay.

The rule must therefore be made absolute with costs.

Rule absolute.

Solicitor for prosecution: *J. C. Button.*

Solicitors for defendants: *Frankish & Buchanan.*

THE SOUTHAMPTON GASLIGHT AND COKE COMPANY, APPELLANTS; THE GUARDIANS OF THE SOUTHAMPTON UNION, RESPONDENTS. 1877 *June* 2.

Quarter Sessions, Appeal to—Reference to Arbitrator—Costs—Taxation, out of Sessions—12 & 13 *Vict. c.* 45, *s.* 13.

An appeal to the quarter sessions against a rate was referred by consent under 12 & 13 Vict. c. 45, s. 13. By the order of reference the costs of the appeal and reference were to be in the discretion of the arbitrator.

The arbitrator determined the matter of the appeal in favour of the respondents, and awarded them the costs of the appeal and reference. The award was thereupon entered as the judgment of the sessions under 12 & 13 Vict. c. 45, s. 13, and the costs having been taxed after the sessions, an order of sessions was subsequently drawn up confirming the rate, and ordering the appellants to pay the costs so ascertained by taxation. The appellants objecting that the order was made without jurisdiction, because the costs had not been taxed in sessions:—

Held, that it was implied in the terms of the reference that the costs should be taxed out of sessions, and that the order was therefore valid.

Reg. v. *Long* (1 Q. B. 740) distinguished.

IN this case there had been an appeal to the court of quarter sessions for Southampton against a rate, and the matter of appeal had been referred, by order of the sessions and consent of the parties, to the decision of an arbitrator under the 13th section of 12 & 13 Vict. c. 45. By the order of reference the costs of the appeal and reference were to be in the discretion of the arbitrator. The arbitrator made his award in favour of the respondents, and awarded to them the costs of the reference and appeal. The award of the arbitrator was afterwards, on the motion of the respondents, entered as the judgment of the sessions as provided for under 12 & 13 Vict. c. 45, s. 13, and an order of the sessions was accordingly drawn up confirming the rate, and ordering that the appellants should pay the costs of the appeal and reference. These costs were taxed after the sessions by the clerk of the peace, under protest on the part of the appellants, who contended that the costs could only be taxed during the sessions. There was no adjournment of the sessions for the purpose of taxation. The appellants refusing to pay the costs, the respondents got the order of the sessions drawn up afresh in the same terms as above, but inserting the amount of the costs as taxed, and this order was removed into the Queen's Bench Division for the purpose of enforcing it as a rule

1877

SOUTHAMPTON GAS CO. v. SOUTHAMPTON GUARDIANS.

of Court, under the provisions of the 18th section of 12 & 13 Vict. c. 45. There was an affidavit by the clerk of the peace that the usual practice of the sessions was for the costs of appeals to be taxed out of sessions, but the affidavits on the side of the appellants denied that the amount of appeal business at the sessions was sufficient to establish anything that could be called a regular practice in the matter. A rule nisi having been obtained on behalf of the appellants to quash the order, on the ground that it was made without jurisdiction,

F. M. White, Q.C., and *Bullen*, shewed cause. This is not an order for costs under the 5th section of 12 & 13 Vict. c. 45. The cases which shew that the costs cannot be taxed after the sessions, on the ground that the taxation of costs is a judicial act, and cannot be done except during the sitting of the sessions, do not apply. They were decided under the 5th section. Here the costs are awarded by an arbitrator who derives his power from the consent of the parties, and the mode in which the costs are to be taxed depend on the terms of the reference. The reasonable construction of the terms of the reference is that the costs are to be taxed in the ordinary way, in which by consent of the parties they are taxed, viz., after the sessions. [They cited *Freeman* v. *Read* (1); *Reg.* v. *Shrewsbury and Hereford Ry. Co.* (2); *Reg.* v. *Justices of Westmoreland* (3); *West London Extension Ry. Co.* v. *Fulham.* (4)]

McIntyre, Q.C., and *Lawson*, supported the rule. The 13th section of 12 & 13 Vict. c. 45, provides that effect shall be given to the award by entering it up as the judgment of the sessions. It is plain upon the terms of that section that the award is not enforceable per se, like an ordinary award, but only as being the judgment of the sessions. The meaning is that the sessions, for the purpose of informing themselves, may delegate their functions to an arbitrator, and when he makes his award, it is to be made the judgment of the sessions. It is just as if, on the hearing, the sessions had come to the same conclusion as the arbitrator, and had given judgment to the same effect as his award. If this be the correct view of

(1) 9 C. B. (N.S.) 301; 30 L. J. (M.C.) 123.
(2) 25 L. T. (O.S.) 65.
(3) 1 D. & L. 178.
(4) Law Rep. 5 Q. B. 361.

the effect of the section, it follows that the case is governed by the decision in *Reg.* v. *Long* (1), that the costs, being given by the act of the sessions, must be taxed during sessions, and if the sessions rise without adjournment there can be no subsequent taxation.

[MELLOR, J. What is the meaning of the provision for making the order a rule of Court in s. 13, if the award is to have no other effect than as an ordinary judgment of the sessions?]

The reason for the provision is that there may be means of enforcing attendance of witnesses, and other similar facilities. The only machinery for enforcing the award is by entering it as the judgment of the sessions.

[LUSH, J. The terms of the reference, which is by consent, are that the arbitrator shall have power over the costs. Can it be supposed that the parties intended, when they consented to this term, that its effect should depend on such a mere technicality as this?]

It is submitted that they meant that the costs should be taxed in the legal and regular manner.

[LUSH, J. There is nothing irregular or illegal in taxing out of sessions when the parties agree to it.]

[They cited *Gay* v. *Matthews* (2); *Rawnsley* v. *Hutchinson*. (3)]

MELLOR, J. I am of opinion that this rule should be discharged. The 13th section of 12 & 13 Vict. c. 45, provides that the matter of appeal may, with consent of the parties, be referred to arbitration in such manner and on such terms as the court of quarter sessions think reasonable and proper. In this case the appeal was so referred by consent of the parties, and by the like consent a power was given to the arbitrator which, without such consent, could not have been given to him, viz., that of determining by whom the costs of the appeal and the reference should be paid. The arbitrator decided the appeal in favour of the respondents, and also gave them the costs of the appeal and reference. But then it is argued that, because it is necessary for certain purposes, and the section therefore provides, that the award of the arbitrator

(1) 1 Q. B. 740.

(2) 33 L. J. (M.C.) 14.

(3) Law Rep. 6 Q. B. 305.

1877

SOUTHAMPTON GAS CO. v. SOUTHAMPTON GUARDIANS.

may be entered up as the judgment of the quarter sessions, the respondents cannot have the costs which the arbitrator, in the exercise of the power given to him, has awarded to them, unless they are taxed during the sitting of the sessions. The power of the arbitrator to give those costs depends on the consent of the parties, and I cannot think that the parties, when they consented to the terms of this reference, ever contemplated that it should be a condition that the costs should be taxed during the sessions. It was, no doubt, intended that they should be taxed by the officer who usually taxes the costs of appeals, in the usual way, but not during the sessions.

I am clearly of opinion that under the circumstances of this case, and having regard to the plain meaning of the terms of the reference, by which power was given to the arbitrator over the costs of the appeal and reference, the costs were properly taxed out of sessions. The provisions of section 13 by which, in aid of the provisions as to arbitration, the order of the quarter sessions may be made a rule of court, seem to me to shew that, though it may be necessary for certain purposes to enter up the award as the judgment of the sessions determining the appeal, it does not follow that the costs given by the award can only be taxed during the sitting of the sessions.

LUSH, J. I am of the same opinion. If the costs had been given by the court of quarter sessions under 12 & 13 Vict. c. 45, s. 5, I think the taxation of costs out of sessions would have been invalid, unless there had been a consent of the parties to such taxation. The decisions shew that that is the rule where the giving of costs is a judicial act of the sessions under s. 5. This, however, is not a case where the costs are given by the sessions, but the case comes within s. 13, and the costs are awarded by the arbitrator. The parties by consent referred it to the arbitrator to assess the amount at which the rate should be fixed, and amongst other terms of the reference the costs of the appeal and reference were left to the discretion of the arbitrator. He awarded that they should be paid by the appellants. It is clear that the parties did not express on the face of the order of reference all the terms intended to apply to it, because they did not say how the amount

of costs was to be determined. That is left to be implied. If the respondents' solicitors had brought in a bill of costs as between attorney and client, the appellants would have rightly said that the meaning was that the costs were to be taxed. It was, no doubt, necessarily implied that the costs were to be taxed in the ordinary way by the clerk of the peace. But there is nothing to shew that it must be implied, or that it entered into the contemplation of the parties as material, that they should be taxed during the sitting of the court of quarter sessions. If the appellants intended to make this a stipulation I think they ought to have said so. The costs were taxed in the ordinary way; in a way that is perfectly regular when the parties agree to it, viz., by the clerk of the peace at some convenient opportunity after the sessions. It seems to me that, by necessary implication from the terms of the reference, they were taxed by the agreement of the parties, and consequently such taxation was perfectly regular. I therefore think this rule should be discharged.

Rule discharged. (1)

Solicitors for appellants: *Bircham & Co.*

Solicitors for respondents: *Stocken & Jupp.*

(1) The Court also gave judgment for the respondents upon another ground, viz., that the appellants were estopped by their conduct subsequently to the sessions at which the judgment was entered up from insisting upon the objection to the taxation out of sessions. It appeared that there had been negotiations between the parties for a compromise of certain other appeals pending between them in relation to other rates, and that a compromise had been effected and subsequent rates made upon a reduced estimate in accordance with such compromise, under such circumstances as to lead the Court to be of opinion that the respondents were led to suppose, before they entered into and acted on the compromise, that no objection would be made to the payment of the costs awarded by the appellants. It has not been thought necessary to incumber the text with the details relating to this point.

1877
May 5.

[IN THE COURT OF APPEAL.]

LEASK *v.* SCOTT BROTHERS.

Bill of Lading, Transfer of—Rights as between Transferee and Unpaid Vendor —Valuable Consideration—Stoppage in Transitu.

The transfer of a bill of lading for valuable consideration to a bonâ fide transferee defeats the right of stoppage in transitu of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder.

In December, 1875, G. & Co. purchased from defendant a shipment of nuts, to be paid for by acceptance at three months on receipt of shipping documents. On the 1st of January, 1876, G. & Co., being already indebted to plaintiff, applied to him for a further advance, which, he said, he would give, but they must first cover their account. G. & Co. promised to give him cover (not naming any particular securities), and plaintiff at once advanced them a further sum of 2000*l.* On the 4th of January the bill of lading of the nuts, indorsed in blank, came into the possession of G. & Co. from defendant, and they accepted defendant's draft; and on the following day they handed the bill of lading to plaintiff with other securities, in fulfilment of their promise to give him cover. This transaction between plaintiff and G. & Co. was bonâ fide. On the arrival of the ship on the 3rd of February, G. & Co. having in the meantime stopped payment, defendant sought to stop the nuts in transitu, and plaintiff claimed them under the bill of lading:—

Held, that the plaintiff had a good title as against the defendant.

Rodger v. *Comptoir d'Escompte de Paris* (Law Rep. 2 P. C. 393) dissented from.

INTERPLEADER action to try the right of the plaintiff as against the defendants to 100 bags of nuts.

At the trial before Field, J., at the London Michaelmas sittings, 1876, the following facts appeared in evidence:—On the 22nd of December, 1875, Geen, Stutchbury, & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London by the *Trinidad*, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On Saturday, the 1st of January, 1876, being prompt day, Geen & Co., being already indebted to the plaintiff, their fruit broker, in between 10,000*l.* and 11,000*l.*, Mr. Geen applied to him for a further advance of 2000*l.* The plaintiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the

tiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the plaintiff's cashier at once handed to Geen a cheque for 2000*l.* On Tuesday, the 4th of January, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, 224*l.* 16*s.* 2*d.*; and on the next day Geen & Co. handed to the plaintiff the bill of lading and other similar documents to the value of about 5000*l.*, in performance of their promise on the Saturday to give the plaintiff cover. On Saturday, the 8th of January, Geen & Co. stopped payment. The *Trinidad* arrived off Liverpool on the 3rd of February, and the defendants sought to stop the nuts in transitu, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold, the price being held to abide the result of this interpleader action.

In answer to questions by the judge, the jury found, that the plaintiff received the bill of lading honestly and fairly; that valuable consideration was given on the understanding of security being given; and that the security given was to secure the 2000*l.*, and also the old account.

The learned judge, after argument, directed judgment to be entered for the defendants, being of opinion that the facts of the case brought it within the principle of *Rodger* v. *Comptoir d'Escompte de Paris* (1), affirmed by the decision of *Chartered Bank of India, &c.* v. *Henderson.* (2)

April 16, 17. *Watkin Williams, Q.C.*, moved to enter judgment for the plaintiff. Geen & Co. became the lawful holders of the bill of lading on it being handed to them by the defendants indorsed in blank, and on their accepting the defendants' draft at three months for the price, and the plaintiff became lawful holder on it being handed to him by Geen & Co. And according to the findings of the jury, the plaintiff was bonâ fide transferee for valuable consideration from the lawful holder of the bill of lading, and was, therefore, legally entitled to it as against the original vendor. This has been the law ever since the leading case of

(1) Law Rep. 2 P. C. 393. (2) Law Rep. 5 P. C. 501.

1877

LEASK v. SCOTT.

Lickbarrow v. *Mason* (1); and the distinction, as to past and present consideration, was first taken in *Rodger* v. *Comptoir d'Escompte de Paris* (2), and is not to be found in any other case, in the dicta of any judge, or in any text-writer. Moreover, the case of *Chartered Bank of India, &c.* v. *Henderson* (3), before the same tribunal, while it recognises the previous decision, very much narrows its application, and the facts of the present case bring it within the later decision. For assuming that the existing debt alone would not have been sufficient consideration, being past, to give a valid title to the plaintiff; here the handing over of the bill of lading was in consequence of a binding contract made on the Saturday to give cover, which could have been enforced both at law and equity.

[LORD COLERIDGE, C.J. *Alliance Bank* v. *Broom* (4) is an authority that performance of the contract would have been decreed in equity.]

Moreover, although not expressed, it is clear that part of the consideration for giving cover was the forbearance in not taking proceedings to enforce the debt, and this is a continuing present consideration. The distinction, however, between past and present consideration is inconsistent with all the cases. [He then went through the judgment in *Rodger* v. *Comptoir d'Escompte de Paris* (2) at length, and referred to *Currie* v. *Misa* (5); *Lempriere* v. *Pasley* (6); *Holroyd* v. *Marshall* (7); *Meyerstein* v. *Barber* (8), citing Blackburn on Sale, pp. 297, 298; *Marie Joseph.* (9)]

R. E. Webster (with him *Murphy, Q.C.*), for the defendants. [The arguments for the defendants are so fully given in the judgment of the Court that it is unnecessary to repeat them.]

W. Williams, Q.C., was heard in reply.

Cur. adv. vult.

May 5. The judgment of the Court (Lord Coleridge, C.J., and Bramwell and Brett, L.JJ.), was delivered by

BRAMWELL, L.J. The defendants have stopped in transitu the

(1) 2 T. R. 63; 6 East, 21, n.
(2) Law Rep. 2 P. C. 393.
(3) Law Rep. 5 P. C. 501.
(4) 2 Dr. & Sm. 289; 34 L. J. (Ch.) 256.
(5) Law Rep. 10 Ex. 153, at p. 168.
(6) 2 T. R. 485.
(7) 10 H. L. C. 191; 33 L. J. (Ch.) 193. 9 Jur. N.S. 213.
(8) Law Rep. 2 C. P. 674.
(9) Law Rep. 1 P. C. 219. 12 Jur. N.S. 677.

goods, the subject of this proceeding. They have done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such stoppage. Whether he has is the question. The facts are few, and as follows:—Geen & Co., the consignees of the goods, were indebted to the plaintiff. On Saturday, the 1st of January, they applied to the plaintiff for a further advance, which he agreed to make on being *first* covered. Geen & Co. promised to give him cover (not naming anything in particular), and the plaintiff advanced them a further sum of 2000*l.*, the plaintiff being content with their promise. On the following Tuesday the bill of lading of the goods in question, consigned by the defendants to Geen & Co., came to the possession of the latter, who, on the following day, Wednesday, deposited it with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favour of the plaintiff.

This being so, the plaintiff contended that he was a bonâ fide holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof and of the goods mentioned in it. This was not denied by the defendants. Their contention was that, though the plaintiff was such holder effectually as against Geen & Co., and their assignees, if they had become bankrupt, or any one claiming through or against them, except the defendants, yet they, the defendants, had not lost their right to stop in transitu. That the right of stoppage in transitu is available and effectual against every one, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading; that, if the consideration were past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage in transitu. That such right was only defeated where there was a transfer for present consideration. That it was so in such case, because the consignor, or stopper in transitu, had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where the

1877

LEASK v. SCOTT.

consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage in transitu should be lost.

Mr. Webster, for the defendants, at first put it that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But, on it being pointed out to him that the title of the transferee was legal, he altered his argument to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The distinction of the two propositions is material.

In support of his argument Mr. Webster cited *Rodger* v. *Comptoir d'Escompte de Paris* (1) before the Judicial Committee of the Privy Council. We think that that case justifies his argument, and is in point. There may be differences in the facts of the two cases, but the ratio decidendi was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a bonâ fide transferee defeats the right of stoppage in transitu. It is true, no doubt, that opinions must be taken secundum subjectam materiam, but it is strange that no judge, no counsel, no writer ever guarded himself against appearing to lay down the rule too widely by mentioning this qualification, if he thought it existed. We cannot help saying then that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all the previous judges and writers who have dealt with the subject. More than that, in *Vertue* v. *Jewell* (2), where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee for valuable con-

(1) Law Rep. 2 P. C. 393. (2) 4 Camp. 31.

sideration so as to defeat the right of stoppage, he puts in, not on the ground that the consideration was past, as was the fact, but on the ground that the transferee had notice of the transferor's insolvency. Further, it is noticeable that this point does not seem to have been mentioned in *Rodger* v. *Comptoir d'Escompte de Paris* (1) till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of bona fides. Still further, with all respect be it said, the reason given in the judgment is not satisfactory. It is said (2), "The general rule, so clearly stated and explained by Lord St. Leonards in the case of *Mangles* v. *Dixon* (3), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it." No doubt. But that rule does not apply here. Lord St. Leonards said that in reference to a case where the title was to a chose in action, an equitable title only, or, dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger* v. *Comptoir d'Escompte de Paris* (4), a title to property in ownership, and to use the old expression, a legal right.

If, besides dealing with the authorities, we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by Mr. Justice Buller, in *Lickbarrow* v. *Mason* (5), apply to such a case as the one before us. Practically such a past consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the plaintiff, or not, was, no doubt, such an understanding that, if the plaintiff had taken proceedings against Geen & Co. the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out and out and been paid part of his debt with

(1) Law Rep. 2 P. C. at p. 403.
(2) Law Rep. 2 P. C. at p. 405.
(3) 3 H. L. C. 702.
(4) Law Rep. 2 P. C. 393.
(5) 2 T. R. 63, at p. 75.

1877

LEASK v. SCOTT.

the price, the consideration would have sufficed, if the transaction was not colourable. If the plaintiff had said, "I cannot take this bill of lading safely as the consideration would be past, do it with the broker next-door and give me his cheque," that would have been valid. Is it desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to consider whether specific performance would be decreed as to this document which was not specified to the plaintiff; but the case of *Alliance Bank* v. *Broom* (1) shews that a general performance would be decreed; and certainly an action would lie for not covering. Therefore the assignor, for such consideration as this, always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen & Co., in this particular case, had said that this bill of lading was coming forward, and they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so if they had said generally that they had securities coming forward and would deposit them; and what is the difference between a promise with such a statement and a promise without it? In the analogous cases of goods obtained under a fraudulent contract, where the vendor loses his title if there is a transfer for value, there is no authority to shew that a past value is not sufficient.

On these grounds we are unable to concur in the opinion of the Judicial Committee in *Rodger* v. *Comptoir d'Escompte de Paris* (2), or with the argument for the defendants. As to the judgment of Mr. Justice Field, it is enough to say that it proceeded wholly on that case and in deference to it.

We are of opinion that judgment should be reversed, and entered for the plaintiff.

Judgment reversed and entered for the plaintiff.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendants: *Lowless & Co.*

(1) 2 Dr. & Sm. 289; 34 L. J. (Ch.) 256. (2) Law Rep. 2 P. C. 393.

TASSELL, APPELLANT; OVENDEN, RESPONDENT.

1877
May 9.

Licence to sell Intoxicating Liquors off the Premises—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9—*Sale of Wine in Grocer's and Draper's Shop—Wooden Case of Wine closed after Prohibited Hours.*

The occupier of a draper's and grocer's shop, who is licensed to sell in the same shop wines and spirits not to be consumed on the premises, cannot be convicted under the Licensing Act, 1874 (37 & 38 Vict. c. 49), ss. 3, 9, for keeping open premises for the sale of intoxicating liquors after prohibited hours, upon mere proof that the shop is kept open after the prohibited hours, without any sale or exposure for sale of intoxicating liquor.

The appellant was charged under 37 & 38 Vict. c. 49, ss. 3, 9, with keeping open premises (elsewhere than in the metropolitan district), for the sale of intoxicating liquors by retail after ten o'clock in the evening. It appeared that he occupied a shop where he sold drapery, grocery, and wines and spirits not to be consumed on the premises. One evening, after ten o'clock, his shop was found open. There was no proof of any sale or exposure for sale of intoxicating liquors after ten o'clock, nor that liquors were then kept in any other place in the shop except in a large wooden case closed with shutters and a lock, which was standing in the shop with a printed notice on it, informing customers that wines and spirits could not be supplied after ten o'clock in the evening:—

Held, that he was not liable, for it must be taken that the premises, as regarded the sale of intoxicating liquors, were bonâ fide closed at ten o'clock.

CASE stated by justices of Kent under 20 & 21 Vict. c. 43.

At a petty sessions at Maidstone, an information preferred by the respondent against the appellant, a grocer, draper, and licensed dealer in wines and spirits, under ss. 3 and 9 of 37 & 38 Vict. c. 49 (1), charging that he "on the 24th of February, 1877, at the parish of Headcorn, at twenty-five minutes past ten o'clock in the evening, at which time premises for the sale of intoxicating liquors by retail situate elsewhere than in the metropolitan dis-

(1) By 37 & 38 Vict. c. 49, s. 3: All premises in which intoxicating liquors are sold by retail shall be closed as follows . . .

(3) If situate elsewhere than in the metropolitan district, or the metropolitan police district, or such town or populous place as aforesaid.

(*c*) On the nights of all other days (except Saturday and Sunday) from ten until six o'clock on the following morning.

By s. 9: Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed, by or in pursuance of this Act, sells, or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, shall, for the first offence, be liable to a penalty not exceeding 10*l.*

1877

TASSELL v. OVENDEN.

trict, or the metropolitan police district, or a town or populous place as severally defined by 'The Licensing Act, 1874,' are directed to be closed, unlawfully did keep open certain premises for the sale of intoxicating liquors by retail," was heard and the appellant convicted in a penalty of 1*l.* and costs.

Upon the hearing it appeared that the appellant occupied a shop in Headcorn, where he sold drapery, grocery, and wines and spirits, not to be consumed on such premises.

On the day named in the information, a police constable, at twenty-five minutes past ten o'clock at night, found the appellant's shop open in the usual way of his trade; he went in and told the appellant that his shop ought to be closed at ten o'clock at night. The appellant drew the police constable's attention to a large wooden case that was standing in the shop, and to a printed notice that was hanging on the case. The constable observed that the front of the case was closed with interlaced shutters, and at the end of the last shutter there was a lock. The appellant told the constable that the case was locked, and took hold of the shutters to shew they were properly secured by the lock; he also produced a key, but did not try the lock with it. The wooden case above mentioned was eight feet by five, and capable of holding thirty dozen of bottles; it stood close to the entrance of the shop before the ordinary counter, and any person entering the shop could immediately see the contents when the shutters were not up; but when up the contents could not be seen. The notice hanging on the case was as follows:—

"Notice.—Customers are informed that in accordance with the new Licensing Act, Messrs. W. & A. Gilbey's wines and spirits cannot be supplied in this shop after ten o'clock at night," and there was a similar notice placed in the shop window.

There was no proof of any sale, or exposure, of intoxicating liquors at the time in question, nor that liquors were kept in any other place in the shop other than in the wooden case.

It was contended on behalf of the appellant that he had not committed any offence against ss. 3 and 9 of "The Licensing Act, 1874," under which the information was laid. That the shop was kept open for the sale of grocery and drapery as the appellant was entitled to keep it, notwithstanding the sections of the Act be-

fore referred to, which require him to close at ten o'clock, provided there was a bonâ fide intention on his part not to sell intoxicating liquors after that hour, and that he had done as much as he could to shew that such was his intention.

The justices, however, thought that ss. 3 and 9 of "The Licensing Act, 1874," were unexceptional, and it was imperative that the appellant should close his licensed premises at ten o'clock at night.

Tickell, for the appellant. The conviction was wrong. To constitute an offence within 37 & 38 Vict. c. 49, s. 3, it is necessary that premises should be kept open for the sale of liquor, and here there was no evidence that the appellant kept open his shop with the object of selling wine. [He was then stopped.]

Biron, for the respondent. There was evidence to support the conviction. In *Brigden* v. *Heighes* (1) the appellant had two shops, a grocer's and a draper's shop, communicating with each other. He shut up, at the appointed hour, the grocer's shop where he sold wine, but kept the draper's shop open. It was held that there was no evidence to justify a conviction, but expressly on the ground that the shop where he sold wine was closed, and separated from the other.

[FIELD, J. Here the shop was kept open, but was it kept open for the sale of liquor?]

The words in s. 3 which describe the offence, "keeps open such premises for the sale of intoxicating liquors," mean that after a certain hour it shall not be lawful to keep open premises of a particular kind, i.e., premises for the sale of intoxicating liquors, or premises where such liquors are sold. It is not necessary that the premises should be kept open with the object of selling liquor: it is enough if they are kept open. The legislature appears to have thought that the safer course was to require the place itself to be shut to the public.

Tickell, in reply. The construction contended for is too inconvenient to have been contemplated. Under 35 & 36 Vict. c. 94, s. 25 (which is incorporated with 37 & 38 Vict. c. 49), if, during any period during which any premises are required under the Act

(1) 1 Q. B. D. 330.

1877

TASSELL v. OVENDEN.

to be closed, any person is found on such premises he shall, unless he satisfies the Court that he was an inmate, servant, or a lodger on such premises, or a bonâ fide traveller, &c., be liable to a penalty of forty shillings. It could never have been meant that any one of the grocery or drapery customers should be liable to this penalty if he entered the shop after ten o'clock.

MELLOR, J. This conviction cannot be upheld. I do not know what may have been the original intention of the legislature, but I think that s. 3 has not the meaning which at first sight it would appear to have, and that the penalty is not imposed upon any person who after the hour mentioned in the section keeps open his premises for some purpose unconnected with the sale of intoxicating liquors. The offence as described in the section is selling or exposing for sale intoxicating liquor, and the facts stated by the magistrates are quite silent as to any sale of liquor or intention to sell it. It is further to be considered that s. 25 of 35 & 36 Vict. c. 94 imposes a penalty on persons who are found in the house after the prescribed hour, unless they can shew that they come within certain exceptions. Taking these facts together, I think the safer construction of s. 3 is to hold that it applies to persons who after the prescribed hour keep open their premises for the purpose of selling liquor, but that the magistrates are not justified in convicting when it appears that nothing of the kind was intended. In *Brigden* v. *Heighes* (1), the argument of the counsel for the appellant and the judgment of the Court rely, no doubt, upon the fact that there was a bonâ fide closing of the grocer's shop, and not merely upon the fact that there was no evidence that liquor was exposed for sale, and both I and my Brother Field probably used expressions from which it might be argued that we thought that the Act requires that the house and premises where the liquor is sold must be closed. But we had not to consider a case like the present, and I must hold that, in the absence of proof that there was a sale or exposure for sale of liquor, the conviction was wrong.

FIELD, J. I am of the same opinion. *Brigden* v. *Heighes* (1) is no authority in favour of this conviction. Here, the appellant

(2) 1 Q. B. D. 330.

1877

TASSELL v. OVENDEN.

kept a shop for the sale of intoxicating liquors off the premises, and it appears that he has a case where his bottles of wine are kept, and that when this case is closed, the liquor cannot be seen. Everything shews that there was a bonâ fide intention not to sell wine after the prohibited hour; but the statement in the case, "the justices thought that ss. 3 and 9 were unexceptional, and that it was imperative that the appellant should close his licensed premises at ten o'clock," shews that they thought they were bound to convict. The construction of s. 3 which Mr. Biron has suggested according to which there is a simple prohibition to keep open during certain hours, premises of a particular description, at first caused me some difficulty, but the arguments which we have heard have quite removed it.

Judgment for the appellant.

Solicitors for appellant: *W. Braikenridge & Sons, for J. Case & Son, Maidstone.*

Solicitors for respondent: *Beal & Hoar, Maidstone.*

[IN THE COURT OF APPEAL.]

April 14.

THE METROPOLITAN RAILWAY COMPANY *v.* DEFRIES AND OTHERS.

Vendor and Purchaser—Rent—Use and Occupation—Admission by Demurrer.

Claim, that by an agreement for the purchase by the plaintiffs of property belonging to the defendants, the purchase was to be completed on the 29th of September, 1869, from which time the plaintiffs were to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. That the purchase was not completed until the 13th of March, 1876, and that the plaintiffs had duly paid the interest. That the defendants had remained in possession, but had paid no rent. That the plaintiffs claimed rent for use and occupation at the rate of 150*l.* per annum as a fair value. The defendants demurred:—

Held, affirming the judgment of the Queen's Bench Division, that under the agreement a fair rent must be paid by the defendants for the time they remained in possession, and that by demurring they had admitted 150*l.* a year to be a fair rent.

APPEAL by the defendants from the judgment of the Queen's Bench Division for the plaintiffs on demurrer to claim. (1)

(1) Ante, p. 189.

Butler ag^t allowing defence after demurrer
Bell - Hutchinson W.N. (1873) 264 L.T. 175 C.A.

1877

METROPOLITAN RAILWAY CO. v. DEFRIES.

Gates, Q.C. (with him *Edward Pollock*), for the defendants. The plaintiffs ought to state distinctly what they claim, and ought to have proceeded before the Chancery Division, which could have assessed an occupation rent. It does not follow that any rent is payable: *Leggott* v. *Metropolitan Ry. Co.* (1) The occupation may not have been beneficial to them. The property has not been let, and the defendants have merely remained in possession until they were paid. At all events judgment cannot be given for 150*l.* a year for seven years merely because it is claimed.

J. J. Aston, Q.C., and *P. Gye*, for the plaintiffs, were not called upon.

LORD COLERIDGE, C.J. In my opinion this judgment ought to be affirmed. [The Lord Chief Justice stated the terms of the agreement.] It was contended that the agreement must be strictly construed, and that the rents and profits must be such as were actually received, the relation of landlord and tenant not existing between the parties. But that is not the true construction of this agreement. The true construction is that which has been put upon it by the Court below, that a fair rent must be paid by the vendors for the benefit which they have had by their occupation. The demurrer admits that the sum claimed is the right sum as the fair value of the rents and profits. The defendants might have said that 5*l.* or 10*l.* a year was the fair value, and might have paid that sum into court. They have not done so, but have taken their chance of succeeding on the demurrer. The demurrer must be overruled and the judgment affirmed.

BRAMWELL, L.J. I am of the same opinion. The agreement contemplated that there might be delay, and provided for payment of interest and for the receipt of the rents and profits. It was admitted that if rent had been received by the defendants they would be liable; but it was argued that the occupation had, as in *Leggott* v. *Metropolitan Ry. Co.* (1) not been beneficial. That argument, however, is of no avail, for on this demurrer the defendants admit, in fact, that there has been a beneficial occupation, and they must account for it.

(1) Law Rep. 5 Ch. 716.

1877

METROPOLITAN RAILWAY CO. v. DEFRIES.

The only misgiving I have is, whether there is an admission that 150*l.* a year is the fair value of the occupation rent; but I think that we must hold this to be admitted on the demurrer as not having been specifically denied.

BRETT, L.J. The only doubt I feel is that expressed by Sir G. Bramwell; but I think that under the new mode of pleading the defendants must be held to have by their demurrer admitted everything stated in the claim.

The conclusion which I should draw is, that whatever might have been advisable under the old system, it is not advisable since the Judicature Acts came into operation to demur.

Judgment affirmed.

Solicitors for plaintiffs: *Burchells.*
Solicitors for defendants: *Scard & Son.*

April 18.

(1) GRECE, APPELLANT; HUNT, RESPONDENT.
(2) GRECE, APPELLANT; HUNT, RESPONDENT.
GRECE, APPELLANT; COMBER, RESPONDENT.
GRECE, APPELLANT; CROWHURST, RESPONDENT.

The Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *ss.* 62, 63—*The Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 69—*Sewering, Paving, &c.—Liability of Owner of Premises—Expenses incurred by Local Board—Notice of Apportionment—Demand, when necessary—Time within which summary Proceedings may be taken*—11 & 12 *Vict. c.* 43, *s.* 11.

Where works are executed by a local authority for the improvement of a street under 11 & 12 Vict. c. 63, s. 69, and 21 & 22 Vict. c. 98, s. 63, and the expenses charged upon the owners of the premises fronting the street, it is necessary before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him, and the six months within which the summary proceedings must be taken, under 11 & 12 Vict. c. 43, s. 11, are to be reckoned from such notice of demand, and not from the notice of apportionment, which is not a sufficient demand.

14 C.L.D. 116
8 Q.B.D. 43
9 Q.B.D. 605
469
10 Q.B.D. 313

THE first case of Grece, appellant; Hunt, respondent, was a case stated by justices for the borough of Reigate under 20 & 21 Vict. c. 43.

1877

GRECE v. HUNT.

The facts and the nature of the arguments are sufficiently stated in the judgment.

The second case of Grece, appellant; Hunt, respondent, raised a similar point in respect of different premises belonging to the respondent, and in respect of another road; while the cases of Grece, appellant; Combes, respondent, and Grece, appellant; Crowhurst, respondent, raised a similar point in respect of premises belonging to each respondent respectively.

1877. Jan. 31, Feb. 1. *J. Brown, Q.C.* (*A. Glen*, with him), for the appellant.

Thesiger, Q.C. (*Fullarton* with him), for the respondents, in addition to the cases cited in the judgment, referred [as to the question whether a formal demand of the amount apportioned was necessary] to *Wilson* v. *Mayor of Bolton.* (1)

Cur. adv. vult.

April 18. The judgment of the Court (Mellor and Field, JJ.) was delivered by

FIELD, J. This is a case stated by justices of the peace for the borough of Reigate, for the purpose of obtaining the opinion of the Court, on certain questions of law.

The substantial appellants are the council of the borough, being the urban sanitary authority for the district.

The respondent is the owner of property within the district abutting upon a private street (not being a highway), called Earlswood Road, and which street was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the appellants.

The appellants on the 7th of March, 1875, in pursuance of s. 69 of the Public Health Act, 1848, (2) gave notice to the respective

(1) Law Rep. 7 Q. B. 105.

(2) 11 & 12 Vict. c. 63, s. 69: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, &c., require them to sewer, level, &c., the same within a time to be specified on such notice, and if such order be not complied with, the said local board may, if they shall think fit, execute the works mentioned as referred to therein, and the expenses incurred by them in so doing shall be paid by the

owners of the premises fronting such street, requiring them to sewer, level, pave, flag, and channel the same, within a specified time.

Such notice not having been complied with by such owners, the appellants executed the works referred to therein (the expenses incurred in so doing amounting to the sum of 638*l.* 1*s.* 3*d.*), and on the completion of the works the appellants' surveyor, in accordance with the provisions of the same section, duly apportioned the

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owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

11 & 12 Vict. c. 43, s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

21 & 22 Vict. c. 98, s. 62: "Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any Act incorporated therewith or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5*l.* per cent. till payment thereof. In all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

"63. Notwithstanding anything in the Public Health Act contained in all cases where by such Act the local board shall have incurred expenses, for the repayment whereof the owners of the premises for or in respect of which the same are incurred, are made liable by the Public Health Act, 1848, or any Act incorporated therewith or by this Act, and such expenses have been settled and apportioned by the surveyors as payable by such owners, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same."

1877

GRECE v. HUNT.

expenses which had been so incurred between the several owners in default, according to the frontage of their respective premises, and on the 12th of April, 1875, the appellants served upon the respondent a notice of such apportionment as required by s. 63 of the Local Government Act, 1858, by which they gave him notice that the amount of the proportion of the said expenses to be paid by him according to the frontage of his premises was 22*l.* 7*s.*

The respondent did not give any notice to dispute the apportionment within the three months limited by the 63rd section, the effect of which was that the apportionment became binding and conclusive upon him.

On the 31st of July, the appellants (who have never declared that the said expenses should be private improvement expenses), served upon the respondent a notice requesting him to pay the said 22*l.* 7*s.* so assessed upon him to the treasurer within fourteen days, and the respondent not having paid the amount so assessed, the appellants, on the 31st of January, 1876, preferred the present complaint by way of summary proceeding for the recovery of that sum. The complaint came on to be heard before the justices on the 15th of May, 1876, when they dismissed the same, but submitted to us the following questions of law.

"1. Whether, as the local board had not declared the said expenses to be private improvement expenses, a demand was necessary, and if necessary, whether the notice of apportionment was a sufficient notice of demand in point of law?

"2. Whether the matter of the complaint arose at the expiration of the three months after the service of the said notice of apportionment, or upon the service of the notice of the 31st of July, 1875, and whether in either case the complaint was made within the time prescribed by 11 & 12 Vict. c. 43, s. 11."

Upon the argument before us, it was contended by Mr. Brown, on the part of the appellants, that a demand was necessary, and that the complaint was preferred in due time as being within six months from the time of the service of the demand of the 31st of July, and in support of this contention he relied upon the latter part of s. 62 of the Local Government Act, 1858, which enacts that "in all summary proceedings by a local board for the reco-

very of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of the notice of demand," which he contended applied to the complaint preferred.

On the part of the respondents, Mr. Thesiger admitted that if a demand was necessary and if the notice of the 7th of April was not (as he contended it was), a demand within the meaning of the statute, the complaint was duly preferred within six months from the time of the service of the demand of the 31st of July, according to the general rule with regard to the computation of the time within which an act is to be done, and as we are of that opinion, we answer that, assuming that the matter of complaint arose upon the service of that notice of demand, the complaint was preferred in due time.

Mr. Thesiger, however, denied that the latter part of the 62nd section was applicable to the present case, which he said was governed by the general enactment of s. 11 of 11 & 12 Vict. c. 43, and he further contended that even if a demand were necessary, the notice of apportionment of the 12th of April amounted to such a demand, and that the period of limitation ran therefore from that date.

Before stating the reasons which have induced us to come to a conclusion in favour of the appellants upon the construction of s. 62 of the Act of 1858 it is advisable to refer to the general policy and provisions of the statutes bearing upon the questions standing for our decision.

One of the principal objects of those statutes is to promote the public health by means of securing the execution of works upon private property calculated to render them not only healthy in themselves but innocuous to the public health, and the statutes consequently provide for the execution of such works in the first instance by the owners or occupiers of the property upon which they are to be executed, and on their default, by the local authority.

But inasmuch as these works, at the same time that they subserve the public health also improve the property upon which they are executed, the legislature provides means for recouping to the public authority the expenses thus incurred. In a case like the present, where the works are executed under the powers conferred

1877

GRECE v. HUNT.

upon the local authority by s. 69 of the Public Health Act, 1848, there are two modes provided for recovering such expenses; first, the total amount of expense is apportioned amongst the owners of the premises supposed to be improved and benefited by the works according to their several frontages, and then the amount so apportioned is to be recovered by summary proceedings taken by the local authority against each owner; secondly, by declaring the expenses to be private improvement expenses.

The result of the first mode is to throw the expense either in one sum or by instalments (s. 146) upon the owners, that of the second is to throw the expenses in any event over a period of years (s. 90), and to throw a portion of the expense upon the occupier or person having a less interest than the whole fee simple (s. 91.)

The course of proceeding when the first mode is adopted is, as above mentioned, for the surveyor to apportion the total expenses of the execution of the works amongst the different owners of the land, presumably benefited by their execution, according to frontages, and such apportionment is conclusive upon each owner at the expiration of three months from the service of a notice of the apportionment upon him (s. 63 of the Act of 1858).

The course of proceeding where the expenses are either by enactment, private improvement expenses (s. 76), or are declared by the local authority to be such, is for the authority to make a rate for the amount of the expenses upon the occupiers of the premises in respect of which they have been incurred, called a private improvement rate, sufficient to discharge such expenses (s. 90, Act of 1848), and to enforce the payment of the sum assessed, in default of payment "when due and for fourteen days after demand in writing," by proceedings before a justice (s. 103).

These being the general provisions of the statutes in question, the question upon which our judgment is asked, arises, viz., whether the latter part of the 62nd section of the Act of 1858 applies to the summary proceedings against the owners referred to in the 69th section of the Act of 1848, so as by implication to make a demand necessary, from notice of which the period of limitation is to be reckoned, or whether it is limited to the second mode of recovering the expenses incurred, viz., when they are

declared to be private improvement expenses, and a rate is made upon the occupier.

Now, the present complaint is undoubtedly a summary proceeding, and in the language of the 62nd section, the expenses are sought to be recovered in a summary manner, and the only question can be whether the next following words in the 62nd section "incurred in works of private improvement" are used in the general sense of works executed upon private property, and tending to improve them, or are to be limited to expenses declared to be private improvement expenses, and for which a private improvement rate has been made.

Now, it must be observed that if the narrower sense is put upon these words, this branch of the 62nd section would be rendered superfluous, for (as already pointed out) by the express language of the 103rd section of the Act of 1848, proceedings cannot be taken to recover the sum assessed in a rate made for private improvement expenses, until fourteen days after it has been lawfully demanded in writing, and as such a demand is, therefore, necessary to make the "matter of complaint" complete, the six months' limitation provided by 11 & 12 Vict. c. 43, applies in such a case, and the enactment of the 62nd section, if so limited, was therefore unnecessary.

We think, therefore, we are well warranted in holding that when the legislature says that the time is to be reckoned as in the 62nd section in "all" summary proceedings, their object was to extend the demand to proceedings like the present, in order that the owner liable might have a distinct written demand before he could be compelled to pay.

It is no doubt true that in the 63rd section a provision is made for giving the owner notice of the apportioned sum which he is alleged to be liable under the 69th section to pay; but no such provision is found in ss. 49, 51, 54, 58, 60, in which similar summary proceedings are provided for recovery of similar expenses, and, without a demand, the party liable would in all such cases be exposed to proceedings the moment the works were completed, without having any means of knowing the amount of his liability, or that it had in fact accrued. We think, therefore, that the legislature has designedly made use of the larger words "works of

1877

GRECE v. HUNT.

public improvement" instead of the narrower ones "expenses declared to be private improvement expenses."

No doubt some little difficulty arises in this construction from the concluding language of the 62nd section, which in speaking generally of the service of "notice of demand" as of a known and existing requisite, instead of specifically enacting that a demand shall be made, seems to imply the existence of some prior specific legislative enactment requiring a demand. But it is to be observed that in the 103rd section of the Act of 1848, the demand is introduced in somewhat the same language of condition, and we do not think that this difficulty (if it be one) is sufficient to outweigh the course of reasoning which induces us to answer the first question put to us, by saying that in the present case a demand was necessary, from which the six months in 11 & 12 Vict. c. 43, s. 11 was to be reckoned.

In the course of the argument various cases were referred to by one side or the other in support of their contention. The case of *Jacomb* v. *Dodgson* (1), which was first cited, is clearly an authority for holding that, at all events, the period of three months from the notice of apportionment, which is the period given to the owner within which he may dispute it, is to be excluded from the computation of the six months within which the complaint is to be made, but as in that case there was a demand made at the expiration of these three months, the decision does not appear to be in opposition to the conclusion at which we have arrived upon principle. The principle upon which the case of *Labalmondière* v. *Addison* (2) is decided, is in accordance with our decision, and the case of *Eddleston* v. *Francis* (3), which at first sight apparently an authority to the contrary is not so really, for although the case was decided after the passing of the Local Government Act of 1858, the proceedings in question in that case had taken place before it passed, and the Court upon that ground declined to apply the 62nd section of the Act to proceedings commenced before its passing.

This being so, the question then arises whether the notice of

(1) 3 B. & S. 461; 32 L. J. (M.C.) 113.

(2) 1 E. & F. 41; 28 L. J. (M.C.) 25.

(3) 7 C. B. (N.S.) 568.

apportionment of the 12th of April was a sufficient demand within the 62nd section, and we answer that question in the negative. 1877

GRECE v. HUNT.

Our reasons for this are that the notice of apportionment is designed to fulfil a very different office from the notice of demand. It is a step in the machinery provided for the purpose of ascertaining the liability of the owner; there is not at the time it is served any liability to pay the apportioned sum, nor can there be, until the lapse of three months afterwards, and in the event of the owner successfully disputing the apportionment, that sum so apportioned will never become due. What we think the 62nd section requires is, such a document as shall bring clearly and pointedly to the mind of the person in default that he is then required to pay the sum which has been in some way previously found to be due from him.

With these answers, therefore, we remit this and the other case of *Grece* v. *Hunt*, as well as those of *Grece* v. *Comber*, and *Grece* v. *Crowhurst*, to the justices for further adjudication.

Solicitors for the appellant: *Nicol, Son, & Jones.*
Solicitors for the respondent: *Morrisons.*

EX PARTE THE SCHOOL BOARD OF LONDON. RE MURPHY. *April* 13.

Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 74—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *s.* 11—*By-laws Nos.* 2 *and* 7—*Habitual or occasional Neglect of Parent to send Child to School—Discretion of Magistrate to direct Form of Summons.*

Where, upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to by-laws made by the board under the Elementary Education Act, 1870, it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act, 1876, s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the by-laws, and to require them to take out a summons under s. 11,—for the option given by the Elementary Education Act, 1876, s. 50, of proceeding either under the statute or the by-laws applies only to offences "punishable" under the Act, and the offence of "habitual neglect" is not so punishable.

RULE calling on a metropolitan police magistrate to shew cause why a mandamus should not issue commanding him to hear and

1877

RE MURPHY.

determine the application of the School Board of London for a summons against one J. Murphy, to answer an information and complaint by the board against him for unlawfully neglecting and omitting to cause his child, Patrick Murphy, to attend school as required by the by-laws of the school board under the Elementary Education Act, 1870.

The facts, as disclosed by the affidavits, were that the school board was constituted under the Elementary Education Act, 1870, and, that under the power contained in s. 74 (1) of that Act, certain by-laws were made by the board and duly sanctioned by the Education Department of the Privy Council. By the second of these by-laws, "The parent of every child of not less than five nor more than thirteen years of age is required to cause such child to attend school, unless there be some reasonable excuse for non-attendance." By the seventh, "Every parent who shall not observe, or shall neglect or violate these by-laws, shall, upon conviction, be liable to a penalty not exceeding 5*s*., including costs,

(1) By the Elementary Education Act, 1870, s. 74, Every school board is empowered to make by-laws as to the attendance of children at school.

By the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11, "If the parent of any child above the age of five years, who is under this Act prohibited from being taken into full time employment, habitually, and without reasonable excuse, neglects to provide efficient elementary instruction for his child,—it shall be the duty of the local authority, after due warning to the parent of such child, to complain to a court of summary jurisdiction, and such court may, if satisfied of the truth of such complaint, order that the child do attend some certified efficient school willing to receive him and named in the order, being either such as the parent may select, or if he do not select any, then such public elementary school as the Court think expedient."

By s. 12: Where an attendance order is not complied with, without any reasonable excuse within the meaning of this Act, a court of summary jurisdiction may on complaint made by the local authority in the first case of non-compliance, &c., impose a penalty not exceeding, with the costs, five shillings; but if the parent satisfies the Court that he has used all reasonable efforts, &c., may, without inflicting a penalty, order the child to be sent to a certified day industrial school, &c.

By s. 50, "Where any act, neglect, or default is punishable under this Act, and also under any other enactment or any by-law made by a school board, &c., proceedings may be instituted in respect of such act, neglect, or default under this Act or such other enactment or by-law in the discretion of the authority or person instituting the proceedings so that proceedings under one enactment or by-law only be instituted in respect of the same act, neglect, or default."

1877

RE MURPHY.

for each offence." In February, 1877, an officer on behalf of the board, applied to the magistrate for a summons as above mentioned. The magistrate, by questions, ascertained that the child was above the age of five years, and was, under the Elementary Education Act, 1876, prohibited from being taken into full time employment, and that Murphy, the parent of the child, had habitually, and without reasonable excuse, neglected to provide for it efficient elementary instruction within the meaning of s. 11 of the last-mentioned Act. The magistrate then said that the summons ought to have been under the Elementary Education Act, 1876, s. 11, sub-s. 1, and that the school board had no right or discretion under s. 50 to elect to proceed for breach of their by-laws. He accordingly offered to grant a summons under s. 11, but refused one for breach of the by-laws.

The rule before mentioned having been obtained,

Ottaway, shewed cause. Under 11 & 12 Vict. c. 43, s. 1, the information or complaint need not be in writing, and the person preferring it is bound to state to the magistrate the facts of the case. The form in which the summons issues is directed by the magistrate. In the present case the facts shewed habitual neglect to provide education within the meaning of the Elementary Education Act, 1876, s. 11. Such neglect is not "punishable" under s. 11, which only empowers the magistrate to make an order for the child to attend school, and therefore there was no option under s. 50 to proceed either under the statute or the by-laws. [He was then stopped.]

Holl, Q.C. (*Fullarton* with him), in support of the rule. The magistrate was bound to grant a summons in the form applied for, and had no jurisdiction except that founded upon the complaint. In *Reg.* v. *Deny* (1), where an information had been laid praying that the defendant might be bound over to keep the peace, it was held that the magistrates, after hearing the facts, could not, against the will of the complainant, convict the defendant of an assault. It cannot be contended that there was not a breach of the by-laws, and the legislature must have intended that it should rest with the board, who institute the proceedings, whether they

(1) 20 L. J. (M.C.) 189.

1877

RE MURPHY.

shall be taken under the by-law or s. 11. Sect. 11 was not intended to interfere with the by-laws, but was passed to meet the case of country school boards neglecting to frame by-laws. As to the proposed construction of s. 11, so as to exclude the case of habitual neglect from the option given by s. 50, it puts too narrow an interpretation upon the word "punishable." The officer of the board had no authority to make complaint or take proceedings except for breach of the by-law. The magistrate interfered with the decision of the board, who have a discretion by ss. 30 and 38.

COCKBURN, C.J. I think the magistrate was right. The question is, whether the case was one in which it was competent to the school board not only to institute proceedings under the by-laws, but to insist upon the magistrate granting a summons, with a view to dealing with the offence under the by-laws, after the magistrate upon inquiry had found that the graver offence, which is created by the 11th section of 39 & 40 Vict., c. 79, was established.

The offence under the by-laws and the offence under the statute are two essentially distinct and separate things. The offence under the by-laws is that of neglecting to send children to school, to constitute which an occasional omission might suffice, while that which is dealt with under the 11th section of the statute, is not that of occasionally omitting to send the child to school, but that of habitually doing so, without reasonable excuse, and the two offences are dealt with very differently indeed. In the one case the parent is simply liable to a pecuniary penalty; in the other the magistrate has power, having made an order which it is incumbent on the parent to obey, upon his disobedience of that order, not only to inflict the penalty which may be imposed under the by-law, but, in fact, to deprive the father of the right of parental control which the law otherwise gives him, and to dispose of the child in the manner pointed out by the statute, namely, by sending it to some industrial school.

Now, the school board say it is in their discretion to adopt which of the two courses they think proper, because s. 50 of 38 & 39 Vict. c. 79, expressly reserves intact and intangible the effect of by-laws made under the prior statute, the words being, "Where any act, neglect, or default is punishable under this Act, and also

under any other enactment, or any by-law made by a school board, proceedings may be instituted in respect of such act, neglect, or default under this Act, or such other enactment or by-law in the discretion of the authority." This, it is argued, gives discretion to the board to proceed either under the by-law or the Act.

At first I was struck with this argument, but, when I come to look more closely at the language of the section, I see that it is only where the act complained of is punishable both under the particular Act of Parliament, and also under the by-laws, that there the school board may elect whether they will take the proceedings under the Act or under the by-laws. But this is not an offence which is punishable under both, because it can only be the subject of proceedings under this statute, and not under the by-law. Therefore, I think s. 50 is not applicable. And what confirms me in this view is that when we look at s. 11, we find that in a case like the present, where there is habitual neglect in sending the child to school, the legislature, in the most emphatic terms that can be used, has said it shall be the duty of the local authority (leaving no discretion whatever) to warn the parent, and if the parent does not act on the warning to apply to the court of proper jurisdiction and there obtain a summons. I think that the legislature has left no discretion whatever, and therefore the magistrate was perfectly right in saying "You come before me to enforce the by-law, but I find you have proved as the foundation of the authority which you call upon me to exercise not the minor offence contemplated by the by-law, but the graver offence contemplated by the Act of Parliament. I will give you a summons, but it shall be under the Act which prescribes your duty, and that which is your duty the law makes mine."

In my opinion, therefore, the school board have no discretion where habitual neglect is made out. It then becomes their duty to enforce s. 11, and the duty of the magistrate to act in conformity with that legislation, and issue the summons for habitual neglect, in order that not only may the parent be punished, but that the child may be protected, which is by far the more serious consideration. I think, therefore, that the magistrate was right, and that this rule should be discharged.

1877

RE MURPHY.

MELLOR, J. I am of the same opinion. I confess that I had some doubt at one time whether it was not within the discretion of the board to proceed either under the by-law or under s. 11. But I have come to the conclusion that that is not so. The policy of the Elementary Education Acts is to secure the education of children, and proceedings under the by-law may be sufficient to compel parents of children under ordinary circumstances to cause them to attend school. This may be secured by the provision for a penalty, which may or may not be inflicted by the magistrate. But I think that when we remember that the great object of the Act was not only to secure the education of children of parents who are willing to educate them, but of children whose parents habitually neglect to educate them, and are incapable of exercising the control over a child which a parent ought to exercise, it will appear that it was against that class of habitual offenders that the section was directed. It constitutes an entirely different mode of dealing with the case from that under the by-law. Under the by-law you have no power to send the child to an industrial school in the case of habitual neglect of the parent, but you are confined to the infliction of a penalty of 5*s*. But s. 11 is of much more importance and has a much wider object. I think the magistrate was bound, or at any rate he certainly had a right to issue the summons, if he found it was a case of not simple neglect to send the child to school in a certain time, but that it was the offence under s. 11, namely, where children habitually wander about the streets not under the proper control of their parents, and fall into company of rogues and vagabonds. Those children are to be educated, and if the persons who should educate them, or take means for their education, do not educate them then the state must exercise control. Therefore the board are not to get rid of this section by saying we will not proceed under it, but under the by-law. Taking all the circumstances into consideration, though I am not prepared to say that there might not have been more convenience if the legislature had given the board a larger discretion, it appears to me that it has made it their duty to proceed under s. 11 where the facts bring the case within it. Therefore, looking at all the circumstances, I come to the conclusion

that the magistrate was justified in this case in refusing to issue the summons which was applied for. 1877

RE MURPHY.

Rule discharged.

Solicitors for prosecution: *Gedge, Kirby, & Millett.*
Solicitors for magistrate: *Walker & Martineau.*

LESTER, APPELLANT; TORRENS, RESPONDENT. *June 7.*

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 12—"*Found drunk on Licensed Premises*"—*Licensed Person found drunk on his own Licensed Premises after the Premises are closed.*

The term "licensed premises," as used in the Licensing Act, 1872, s. 12, means licensed premises while they are open to the public for the purposes of the license; consequently a licensed person who is found drunk on licensed premises in his own occupation, after licensed hours and when the premises are closed to the public, is not liable to a penalty under s. 12.

CASE stated by the stipendiary magistrate of Salford, under 20 & 21 Vict. c. 43.

The facts were as follows:—An information had been laid against the appellant under the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 12, for being found drunk on licensed premises. At half-past eleven at night the appellant, a licensed person, was found drunk by a policeman on licensed premises in his own occupation. The premises had been closed for the night, and no one was on them, besides the appellant, but his wife and family and servants. The magistrate convicted the appellant, and fined him under the 12th section. The question for the Court was whether he was rightly so convicted.

Ambrose, Q.C., for the appellant. The 12th section does not apply to the case of a licensed person. The 13th and subsequent sections apply to his case. If the section does apply to a licensed person there was no offence here within the section. The section is aimed at offences against public order. Here there was no such offence. "Licensed premises," within the section, means premises being used as licensed premises within business hours. Here the premises, being closed, were in the same position as any other

1877

LESTER v. TORRENS.

private premises. The statute 21 James 1, c. 7, which makes drunkenness an offence generally, is repealed by the Act.

[He cited 35 & 36 Vict. c. 94, s. 67, and *Warden* v. *Tye*. (1)]

McIntyre, Q.C., for the respondent. The 12th section applies to all persons, both licensed persons and others.

The facts here bring the appellant within the plain words of the section. The provisions of the statute of James are no doubt repealed to the extent that drunkenness is only an offence now when it occurs in certain places. Licensed premises are among those places. There is nothing whatever in the section to limit its effect to the time during which the premises are open. If a a man were found drunk on licensed premises after closing time, not being a licensed person, would he not be within the section?

MELLOR, J. I am of opinion that the decision of the magistrate was erroneous. It seems to me that the construction of the 12th section suggested by the respondent is far too large. It would produce the most singular consequences if carried out to its extreme results. According to that construction a publican is placed by the section in his private capacity in a position wholly unlike that occupied by any other person. In addition to his obligations with regard to the conduct of his business, it is suggested that he comes under the obligation, while in his own premises, to be sober not only all day but all night. It is, no doubt, very desirable that he should be so, but we have not to do with the morality of the question but with the penal provisions of the Act. It would be a strange construction to hold that during the whole night the premises are licensed premises for the purpose of the 12th section. In order to put the proper limitation on this part of the section we must look at the context. The words connected with "licensed premises" are, "found drunk in any highway or other public place, whether a building or not." The word "found" in connection with "public place" seems to me to point to the true meaning. When the premises are open during the hours of business, and so a person may, as one of the public, enter and find the offender drunk, the section applies, and I am inclined to think that it would apply whether the person so found was tenant of the

(1) 2 C. P. D. 74.

house or not. But I cannot think that when the house is closed and everybody excluded but the inmates, because a constable happens to be fetched in for some purpose and finds the landlord drunk, that that is a finding drunk on licensed premises within the meaning of the section. Publicans would, if this were so, be distinguished in their private capacity from any other class of persons. I think the legislature would have used other words than these, if they had meant to produce such a result. The premises no longer being a public house for the purposes of public resort, I think the section did not apply, and the conviction must therefore be quashed.

LUSH, J. Some qualification must obviously be introduced to carry out the intention of the section. I think it may be found in the heading of these clauses, viz., Offences against Public Order. It is clear that it was not intended to punish drunkenness in general, for the provision of the statute of James, which did so, was repealed, and no similar provision re-enacted. Drunkenness is only so far made an offence as it is an offence against public order. I cannot, however, agree with Mr. Ambrose that innkeepers are excluded from section 12 altogether. Why should an innkeeper found drunk on a highway not be liable to the penalty? That section deals with a person as a member of the public, and an innkeeper is within the section as a member of the public. The section adds to the words "public place" the words "whether a building or not." This was necessary because a building open alongside the highway is as much public for the purposes of the Act as the highway. I think, looking at the collocation of words, that "licensed premises," for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a quasi public place.

It seems to me that the innkeeper, if drunk on his own premises while they are open, is as much amenable to the penalty as if he was found drunk on the highway. It is clear, however, that the section does not apply to a person, not being an innkeeper, found drunk in his own private house. If the innkeeper lived next door to the licensed premises, he might be drunk in his own house without being liable. Why should he be liable if he lives on the

1877

LESTER v. TORRENS.

licensed premises and gets drunk at a time when they are not open, because during certain hours of the day they are open to the public? When they are closed, they are as much his private house as a house in which he lives next door. It is contended that the Act applies to licensed premises at all times of the day. This would have the effect of making an innkeeper who gets drunk in his own bedroom liable. It cannot have been intended that the section should produce such an extraordinary result. The section must apply only to licensed premises, meaning premises used for the time being as licensed premises, and so open to the public.

Conviction quashed.

Solicitors for appellant: *Le Riche & Son.*
Solicitors for respondent: *Milne, Riddle, & Mellor.*

June 7.

BROWN, APPELLANT; THE GREAT EASTERN RAILWAY COMPANY, RESPONDENTS.

By-law—Railway Company—Notice of Amount demanded—"Penalty or Forfeiture"—8 & 9 Vict. c. 20, s. 145.

5 QBD 457
459
7 QBD 35

A by-law made by a railway company imposed upon a passenger failing or refusing to produce his ticket the liability to pay the amount of the fare from the station whence the train, by which such passenger travelled, had originally started:—

Held, that there must be a demand of the specific sum payable in respect of such fare, in order to enable the company to recover it:

Semble, that such sum is a penalty or forfeiture within 8 & 9 Vict. c. 20, s. 145.

Chilton v. *London and Croydon Ry. Co.* (16 M. W. 212) discussed.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts were in substance as follows:—

An information had been laid under 8 & 9 Vict. c. 20, s. 145, by the respondents against the appellant, for that being a passenger on the railway he had failed to shew his ticket, when required to do so by a servant of the company, contrary to one of the company's by-laws.

The by-law was as follows:—"No passenger will be allowed to enter any carriage on the railway, or to travel therein upon the

railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket (whether a contract or season ticket, or otherwise) to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

The defendant did travel from some station on the company's line as far as Stratford, and when asked by the ticket collector there to shew his ticket, failed to do so. He was the holder of a season ticket from Brentwood station to Liverpool Street station. The train in which he was travelling had started from Colchester and the fare from thence was 7*s.* 6*d.* No demand was made from the appellant of any specific sum under the by-law.

It was contended before the magistrates for the appellant, first, that the amount required to be paid must be demanded at the time when the offence was committed, and, secondly, that this was not the case of a penalty or forfeiture under 8 & 9 Vict. c. 20, s. 145.

The magistrates convicted the appellant in the sum of 7*s.* 6*d.* and costs.

Brown, Q.C. (*McLeod* with him), for the appellant. It is clear that a demand of the specific sum, which the company alleged that the appellant was liable to pay, was necessary. The facts upon which that amount depends are in the knowledge of the company, and not of the appellant.

The case falls, therefore, within the principle of the cases in which it has been held that when the amount of a money demand alleged to be payable by one party to another depends on some fact known to the party making the claim, and not to the other, notice to the latter of the specific sum demanded must be proved. The party failing to produce his ticket may wish to avoid all litigation, and pay the amount. But he cannot, unless informed what it is.

Secondly. The amount payable under the by-law is not in the

1877

BROWN v. GREAT EASTERN RAILWAY CO.

nature of a penalty or forfeiture, and so not recoverable before magistrates summarily under 8 & 9 Vict. c. 20, s. 145, which relates only to the recovery of a "penalty or forfeiture." The by-law merely contains a provision that if the passenger cannot produce his ticket he is to pay a fare calculated from the place whence the train started. This is for the protection of the company, who cannot know where the passenger got into the train, and not for the punishment of the party. The company's proper remedy was to sue in the county court. In *Chilton* v. *London and Croydon Ry. Co.* (1), Parke, B., held that such a by-law did not impose a penalty or forfeiture. A reason for not construing the by-law as imposing a penalty or forfeiture is that it possibly might be bad for uncertainty if so construed.

Metcalfe, Q.C. (*A. Metcalfe* with him), for the respondents. The actual decision in *Chilton* v. *London and Croydon Ry. Co.* (1) did not turn on the question whether such a by-law imposes a penalty or forfeiture, but on the question whether the company could arrest the passenger under such a by-law if he refused to pay. It is submitted that in substance this is in the nature of a penalty or forfeiture. The remedy by suing in the county court would be quite inadequate, and in many cases entirely ineffectual. No demand of the amount was necessary in a case where, as here, the party never asked for any information as to what the amount was, or shewed any intention of paying it voluntarily. The summons itself was a sufficient demand. [He cited *Dearden* v. *Townsend* (2), and *Woodard* v. *Eastern Counties Ry. Co.* (3)]

Brown, Q.C., in reply.

MELLOR, J. I am of opinion that the company, whose by-law deals in this way with the cases of persons who fail or refuse to shew their tickets, are bound, before they can recover the amount of the payment so imposed upon the person in default, to inform him of the amount he becomes so liable to pay when the offence has been committed. It would, as it appears to me, be safer in such cases to affix a specific sum, by way of penalty, to the offence; but I am inclined to think it is sufficient in the case of a railway

(1) 16 M. & W. 212; 16 L. J. (Ex.) 89. (2) Law Rep. 1 Q. B. 10.
(3) 30 L. J. (M.C.) 196.

where the maximum amount of the payment that could thus be imposed would not exceed £5, to say, as is done here, that the offender shall pay the amount of the fare from the place whence the train started. But if that is done, then I feel confident that there can be no recovery of such amount without a demand of the specific sum. If it were otherwise, then, however willing the party might be to pay it, the company could compel him to come before the magistrate. The by-law is intended to protect the company against excuses for the non-production of the ticket, into the truth of which they have no opportunity of investigating; and if a person enters a carriage and assumes the character of a passenger, but fails to produce the ticket, then, for the protection of the company, who have no means of knowing from what station he has travelled, he is bound to pay the fare from the remotest point at which the train started. But the place from which the train originally started and the amount of such fare are matters which are in the knowledge of the company, and not of the passenger. Unless the company make a demand, the passenger cannot tender any sum, so as to excuse himself. It is clearly necessary, on principle, that there should be such a demand. I am inclined to think, notwithstanding the great weight which must be attached to the opinion expressed by Lord Wensleydale in *Chilton* v. *London and Croydon Ry. Co.* (1), which, however, was not necessary to the decision of the case, that this is a case of a penalty or forfeiture. It is, however, unnecessary to decide the point. For these reasons the conviction must be quashed.

LUSH, J. I should say, if it were necessary to decide the point, that the imposition of a fare which would generally be larger than the fare for the journey on which the person in default had travelled is in the nature of a penalty or forfeiture. It is the exaction of a larger sum as a punishment for acts of commission or omission. I also think, if it were necessary to decide it, that the by-law is not bad because it does not fix a specific penalty. It seems to be quite as good as many of the by-laws referred to as good in Comyns' Digest, title 'By-law' (B 4); for instance, a

(1) 16 M. & W. 212; 16 L. J. (Ex.) 89.

1877

BROWN v. GREAT EASTERN RAILWAY CO.

by-law that every burgess of St. Albans pay a reasonable sum for building of the courts when the term was held there. The principle of id est certum quod certum reddi potest appears to apply in these cases. Nor do I think that the by-law was bad in the case of this company, because in the case of some companies it might impose a sum larger than 5*l*. In the case of this company it clearly could not. All these points, however, it is not necessary to decide, because I am clearly of opinion that the sum so imposed being of uncertain amount, in the sense that it would have to be ascertained by reference to matters better known to the company than to the party in default, must be demanded before proceedings can be taken for its recovery. It is one of those cases where, according to the principles of the common law, notice must be given to the party of the amount he has become liable to pay, inasmuch as he cannot be presumed to know it.

Conviction quashed.

Solicitor for appellant: *W. W. Brown.*
Solicitor for respondents: *Shaw.*

Feb. 3.

[CROWN CASE RESERVED.]

THE QUEEN *v.* FLATTERY.

Rape—Consent—Submission—Carnal connection under Pretence of Surgical Operation.

The prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner:—

Held, that the prisoner was guilty of rape.

Reg. v. *Barrow* (Law Rep. 1 C. C. 156) questioned.

CASE stated by Hawkins, J.

The prisoner, John Flattery, was indicted for a rape upon Lavinia Thompson at Halifax, in the county of York, on the 4th of November, 1876. He was tried at the Winter Assizes at

1877

THE QUEEN v. FLATTERY.

Leeds, in December, 1876, and was convicted, but the learned judge postponed judgment until the next assizes, in order to obtain the opinion of the Court upon the following case :—

Lavinia Thompson, the prosecutrix, is nineteen years of age, and she is the daughter of, and lives with, Thomas and Hannah Thompson, who are labouring people in the neighbourhood of Halifax.

On and for some time previous to the 4th of November last she was in ill-health and subject to fits. On the 4th of November, 1876 (being market-day at Halifax), with a view to obtain medical and surgical advice and relief, she went with her mother to Halifax to consult the prisoner, who kept an open stall in the market, at which he professed, for money consideration, to give medical and surgical advice. They went together to the prisoner's stall, and there saw him, and in the presence and hearing of the prosecutrix, her mother told the prisoner her condition as aforesaid, and that she was subject to fits, and consulted him as to a remedy. The prisoner expressed a desire to examine the prosecutrix with a view to giving the advice sought, and requested the prosecutrix and her mother to follow him to the Peacock Inn, which was close by, for that purpose, and they did so.

At the Peacock Inn the prisoner put several questions to her mother touching the condition of the prosecutrix, and made some examination of her person. Having done this, the prisoner, not believing that the advice he was about to give would be of any service to prosecutrix, not intending nor with any view to perform a medical or surgical operation, but solely with a view to gratify his lust, and have that carnal sexual knowledge of her person which he afterwards had, as after stated, fraudulently and knowing that he was speaking falsely, told the mother, in the presence and hearing of the prosecutrix, that "it was nature's string wanted breaking," and asked if he might break it. The mother replied that she did not know what he meant (as in fact she swore she did not), but that she did not mind if it would do her daughter any good. At that moment the prosecutrix, in the prisoner's presence, had a fit and fainted away. When she came to herself again, the prisoner, in the prosecutrix's presence and hearing, fraudulently and falsely repeated that nature's string

1877

THE QUEEN v. FLATTERY.

wanted breaking, and added that if that did not do her good nothing would, and he again then asked if he might break it. Again the mother said she did not mind if it would do her daughter, the prosecutrix, any good. On this the prisoner said to the mother, "You stay here, and I'll try." He then went into a small adjoining room, followed by the prosecutrix, solely in order, as he represented, and as the prosecutrix and her mother believed, that he might perform the operation he had advised, and which both the prosecutrix and her mother, on the prisoner's representation aforesaid, believed would probably effect her cure, and not with any intention on the part of the prosecutrix that the prisoner should have sexual connection. In that room the prisoner put the prosecutrix on the floor, and then and there had carnal sexual connection with her, the prosecutrix making but feeble resistance, believing (as she swore) that the prisoner was merely treating her medically, and performing a surgical operation, as he had advised, to cure her of her illness and fits, and submitting to his treatment solely because she so believed, such belief having been wilfully and fraudulently induced by the prisoner as aforesaid. Unless such submission amounted in law to consent, there was no consent to the prisoner having connection with the prosecutrix.

The question was whether, under these circumstances, the conviction was warranted in law.

Lockwood, for the prisoner. On the evidence as stated, the prosecutrix submitted, in such a sense as that her submission was equivalent to consent, to the act of connection. And, that being so, the act was not rape, even though consent was obtained by fraud: *Reg.* v. *Barrow.* (1) The case differs from *Reg.* v. *Case* (2), where the prosecutrix did not know the nature of the act done to her. There is no such finding here; and in the absence of an express finding it cannot be presumed, especially having regard to the age of the girl.

[*Reg.* v. *Fletcher* (3) and *Reg.* v. *Barratt* (4) were also referred to.]

(1) Law Rep. 1 C. C. 156.
(2) 1 Den. Cr. C. 580; 19 L. J. (M.C.) 174.
(3) Bell Cr. C. 63; 28 L. J. (M.C.) 85.
(4) Law Rep. 2 C. C. 81.

1877

THE QUEEN v. FLATTERY.

Sir H. Giffard, S.G. (*C. Bowen* with him), for the prosecution, was not called upon.

KELLY, C.B. I think this conviction ought to be affirmed. Mr. Lockwood has ably argued that there was consent on the part of the prosecutrix, and therefore no rape. But, on the case as stated, it is plain that the girl only submitted to the plaintiff's touching her person in consequence of the fraud and false pretences of the prisoner, and that the only thing she consented to was the performance of a surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother was the operation which had been advised; sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other words, she submitted to a surgical operation and nothing else. It is said, however, that, having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is therefore not within the authority of those cases which have decided, decisions which I regret, that where a man by fraud induces a woman to submit to sexual connection, it is not rape.

MELLOR, J. I am of the same opinion. In the statute 13 Edw. 1, c. 34, rape is defined to be, "if a man ravish a married woman, maid, or other woman, when she neither assented before nor after." It is said that submission is equivalent to consent, and that here there was submission. But submission to what? Not to carnal connection. The case is exactly within the words of Wilde, C.J., in *Reg.* v. *Case* (1): "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will." I

(1) 1 Den. Cr. C. at p. 582.

1877

THE QUEEN v. FLATTERY.

agree with the Chief Baron's regret at the decision in *Reg.* v. *Barrow*. (1) If the point there decided should arise again before me, I should take such a course as that the matter might be reconsidered.

DENMAN, J. I am of the same opinion. I can see nothing in the case amounting to consent, either in fact or in law, to the act of carnal connection. I think the definition of rape in the statute cited may be accepted, subject to one qualification. There may be cases where a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does. I agree in wishing that the point decided in *Reg.* v. *Barrow* (1) should be reconsidered.

FIELD, J. I am of the same opinion. The question is one of consent, or not consent; but the consent must be to sexual connection. There was here no such consent. As to *Reg.* v. *Barrow* (1), the question there was different; but I also should hesitate to apply that case.

HUDDLESTON, B. I am of the same opinion. The question is whether the prosecutrix consented that the prisoner should have connection with her. This she did not. Therefore the case is different from *Reg.* v. *Barrow* (1), where the woman permitted the intercourse, though under a mistake fraudulently induced as to the person. But I too should like to have the point decided in that case reconsidered.

Conviction affirmed.

Solicitor for prosecution: *Solicitor for the Treasury.*
Solicitor for prisoner: *J. H. Leeming, Halifax.*

(1) Law Rep. 1 C. C. 156.

[CROWN CASE RESERVED.]

THE QUEEN *v.* SCOTT. 1877

April 21.

Perjury—Evidence of Institution of Suit in which Perjury committed—Rules of Supreme Court, Order V., Rule 7, Order XLI., Rule 1.

Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, the existence of the action is sufficiently proved by the production, by the officer of the Court, of the copy writ filed under Order V., Rule 7, and the copy pleadings filed under Order XLI., Rule 1, of the Rules of the Supreme Court.

CASE stated by the Recorder of London.

At a session of the Central Criminal Court, on Monday, the 9th day of April, 1877, James Stanford Scott was tried on an indictment for perjury, of which the following is a copy :—

"Central Criminal Court, to wit: The jurors for our Lady the Queen upon their oath present that heretofore an action was brought in the Chancery Division of the High Court of Justice in which James Stanford Scott was the plaintiff, and William Wood, John Wood, and others were defendants, and the said action came on for hearing upon the 16th of February, 1877, before the Honourable Sir James Bacon, Knight, one of the Vice-Chancellors of the Chancery Division of the High Court of Justice, at his court at Lincoln's Inn, in the county of Middlesex, and the said James Stanford Scott did, upon the said 16th day of February aforesaid, appear as a witness upon the hearing of such action, and was duly sworn to give true evidence thereon, and the same James Stanford Scott did then swear" [setting out the alleged perjury].

There were several other counts assigning other perjuries on the same occasion.

To prove that the action mentioned in the indictment was pending and was tried as alleged, documents were tendered in evidence, No. 1, the copy (filed under the rules) of the original writ of summons; No. 2, a copy of the pleadings in the action; No. 3, the original order to dismiss the action. Nos. 1 and 2 were produced from the Record and Writ Clerks' Office, and No. 3 was produced by the solicitor for the defendants in the action.

1877

THE QUEEN v. SCOTT.

It was objected by counsel for the prisoner that the original writ of summons in the action was the necessary, and in fact the only, evidence receivable to prove that any action was pending; and that as there was no evidence that it was lost, and no notice to produce the original writ had been given to the prisoner, who was the plaintiff in the action, the document produced was no evidence, even if it had been signed according to Rule 7; and it was also objected that it was not so signed.

It was also objected that the other documents produced, viz. Nos. 2 and 3, were, in the absence of the writ, not receivable in evidence as proof of the pending or trial of any action.

The learned recorder received the evidence tendered, and the jury found the prisoner guilty.

The learned recorder reserved for the Court for the consideration of Crown Cases (amongst others) the question—

First, whether the evidence of the pending and trial of the action was lawfully and properly received?

If the evidence was properly received the conviction was to be affirmed.

If the evidence was not properly received the conviction was to be reversed.

Willis, Q.C. (*Gill* with him), for the prisoner. The original writ issued in the action is the only proper evidence of the commencement of the action. And in the absence of any evidence of its loss the filed copy is not admissible. The writ must have been produced before the Judicature Acts; and there is nothing to make it otherwise in those Acts.

Gorst, Q.C. (*Nalder* and *Edward Clarke* with him), was not called upon.

The Court (Cockburn, C.J., Mellor, Grove, Lindley, and Hawkins, JJ.) held the evidence sufficient.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*

Solicitors for prisoner: *Charlton & Culpepper.*

[CROWN CASE RESERVED.]

THE QUEEN *v.* TUCKER.

1877
April 28.

Music—Dancing—Entertainment of like kind—Skating Rink—Band of Music —25 Geo. 2, c. 36, s. 2.

The defendant kept a skating rink within twenty miles of London. The rink was inclosed by a wall, and was partly roofed with canvas and partly open to the air. It was open for skating in the daytime and in the evening. In the day time there was no music. In the evening a band played operatic and dance music while the skaters skated. The defendant had no licence under 25 Geo. 2, c. 36 :—

Held, that the defendant might properly be convicted of keeping a place for public entertainment of a like kind to music and dancing without a licence.

Semble, he might also be convicted of keeping a place for public music, without a licence.

Case stated by the chairman of the Surrey quarter sessions.

At the general quarter session for the county of Surrey, on the 2nd of January, 1877, John Mann and Robert Tucker were tried on an indictment of which, so far as material, the following is a copy :—

Surrey to wit. The jurors for our Lady the Queen, upon their oath, present that John Mann and Robert Tucker, on the first day of October in the year of our Lord one thousand eight hundred and seventy-six, and on divers other days between that day and the day of taking this inquisition, in the Blackfriars Road, in the parish of St. George the Martyr, Southwark, in the said county of Surrey, and within twenty miles of the cities of London and Westminster, unlawfully did keep and maintain a certain place for public dancing and music, situate in the said road and parish aforesaid, and within twenty miles of the cities of London and Westminster, without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace for the county aforesaid, signified under the hands and seals of four or more of the justices there assembled at such sessions according to the directions of the statute in such case made and provided, the said dancing and music not being lawfully exercised and carried on under or by virtue of any letters patent,

1877

THE QUEEN v. TUCKER.

or licence of the Crown, or licence of the Lord Chamberlain of her Majesty's household, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, contrary to the statute in such case made and provided, and against the peace.

Second count: For keeping and maintaining a certain place for public music without a licence.

Third count: For keeping and maintaining a certain place for public entertainment of a like kind to an entertainment for public music and dancing without a licence.

There were other counts, which for the present purpose are not material.

From the evidence it appeared that the defendant Tucker kept a skating rink in the Blackfriars Road, in the parish of Saint George the Martyr, Southwark, in the county of Surrey, and therefore within twenty miles of the cities of London and Westminster, as defined by the 2nd section of 25 Geo. 2, c. 36, intituled "An Act for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses," without a licence from the last preceding Michaelmas quarter sessions of the peace for the said county, "for publick dancing, musick, or other publick entertainment of a like kind," or by virtue of letters patent, or licence of the Crown, or the licence of the Lord Chamberlain.

The rink was inclosed by a high wall, and was partly covered by a canvas roof, and was partly open to the air.

An orchestra was built, and there was a band of six persons, who performed upon two violins, a harp, a double bass, a cornet, and a flute. Selections of operatic and dance music were played while the people skated on Plimpton's roller skates. The rink was open to the public for some hours during the day, and also at night, from 7 p.m. to 10 p.m. No music was played during the day, but at night the band played between 7 and 10 p.m. About fifty persons were present, some of whom were skating, and some were sitting around the rink. There was no way into the rink except through a turnstile. Each person was charged 1s. on admission, and 6d. for the use of the skates. The

accompanying handbill was distributed inside and outside the building:—

SOUTH METROPOLITAN SKATING RINK.
Temperance Hall,
Blackfriars Road,
Next to Peabody's Buildings.
Now Open,
From 10·30 a.m. to 1 p.m., 2·30 to 5·30, and from 7 to 10 p.m.
Admission
One Shilling.
Plimpton Skates, 6d.
Long's Surrey Band
will be in attendance each evening, and discourse some of the choicest selections of Operatic and Dance Music, including the celebrated Shadow Dance, so suitable for the Skating Rink.

There was no case against the defendant Mann, and the chairman therefore directed the jury to acquit him.

It was contended by counsel that the music was not a main part of the entertainment, but only subsidiary to the skating: *Guaglieni* v. *Matthews*. (1) That skating was not dancing within the statute. Nor did the entire performance in any sense come within the words of the above statute as being a public entertainment of a like kind, i.e. to public dancing or music.

On the part of the prosecution, the case of *Hall* v. *Green* (2) was relied on as shewing that the music need not be a principal or essential part of the entertainment.

In explaining the indictment to the jury, the chairman left it to them to say whether music was the main part of the entertainment or only subsidiary thereto, whether skating with music in the manner described by the witnesses and in the published bill was or was not dancing and music within the meaning of the statute, or if not, whether it was or was not a public entertainment of a like kind to public dancing or music.

The jury found the defendant guilty on the first and third counts of the indictment.

Counsel on behalf of the defendant objected that skating was

(1) 34 L. J. (M.C.) 116. (2) 9 Ex. 247; 23 L. J. (M.C.) 15.

11 Jur. N.S. 636

1877

THE QUEEN v. TUCKER.

not dancing, and that the evidence did not disclose any entertainment within the meaning of the statute.

Judgment was respited for the purpose of taking the opinion of the Court for the consideration of Crown Cases Reserved on these objections. If the Court should be of opinion that the objections of counsel for the defendant were valid, the conviction was to be quashed, if not the conviction was to be affirmed.

Lane, for the defendant. The conviction on the first count, which is for keeping a place for "public music and dancing," cannot stand. Skating is not dancing. And music is only within the section when it forms an independent and primary part of the entertainment, not when it is merely subsidiary to something else: *Guaglieni* v. *Matthews*. (1) Here the music is as completely subordinate to the skating as it was in that case to the equestrian exercises. Moreover, by acquitting on the second count, the jury have negatived the existence of music as a substantive entertainment. Nor can the conviction on the third count be sustained; for the entertainment is not of a like kind with music and dancing. To see what is of a like kind, within the meaning of the statute, it is necessary to consider the mischief which the statute was intended to meet. The object, as appears from the preamble, was to check crime by prohibiting entertainments of a class likely to prove dangerous to morals. Skating, which is used as a mere exercise, is not a thing of the same kind with public dancing, from the point of view of the statute.

Besley (*Tickell*, with him), for the prosecution. The defendant was rightly convicted on the first count. The words of the statute are in the disjunctive; and the place was kept for music, although for skating also. The decision in *Guaglieni* v. *Matthews* (1) was wrong. Music is not the less within the section because it is a subordinate part of the entertainment. [He cited *Bellis* v. *Beal* (2); *Gregory* v. *Tuffs* (3); *Gregory* v. *Tavernor* (4); *Hall* v. *Green* (5); *Frailing* v. *Messenger* (6); *Garrett* v. *Messenger*. (7)]

(1) 34 L. J. (M.C.) 116. (4) 6 C. & P. 280.
(2) 2 Esp. 592. (5) 9 Ex. 247; 23 L. J. (M.C.) 15.
(3) 6 C. & P. 271. (6) 16 L. T. (N.S.) 332.
(7) 16 L. T. (N.S.) 414.

1877

THE QUEEN v. TUCKER.

COCKBURN, C.J. Whatever we may think of the merits of this legislation as applied to such a case as the present, we must administer the law as we find it. According to the Act, "any house, room, garden, or other place kept for publick dancing, musick, or other publick entertainment of a like kind," in or within twenty miles of London or Westminster, without a licence, is to be deemed a disorderly house or place.

The jury have convicted the defendant on the first count of keeping a place for public dancing and music. Now rinking may, no doubt, take the form of dancing, but there is no evidence that it did so here. Therefore the conviction cannot be supported on the ground of dancing. But the count also charges music; and I think that part of the charge is proved. A difficulty, however, arises upon this point. The jury must have convicted on the first count on the ground that they thought rinking was dancing; for they have acquitted the defendant on the second count, which is for music alone, a count on which they ought in my opinion to have convicted.

I am not prepared to overrule the decision in *Guaglieni* v. *Matthews*. (1) It is not necessary either to affirm or question it. That decision only applies where the music is merely subsidiary to something else which forms the real substance of the performance. It does not apply where the music forms an independent attraction, and an integral part of the entertainment. And that it did so here is shewn by the fact that the skating went on without music in the daytime, and with it only in the evening.

As however the jury have acquitted on the charge of music in the second count, and so shewn in what sense they meant to convict on the first count, I think it would not be safe to affirm the conviction on that count.

The third count charges the defendant with keeping a place for an entertainment of a like kind with music and dancing. Rinking may or may not be similar to dancing; and when it takes place to the accompaniment of music it becomes of a like kind with dancing to music.

It has been said that the case is not within the mischief of the statute. But I do not know that that is so. Such a place

(1) 34 L. J. (M.C.) 116.

1877

THE QUEEN v. TUCKER.

kept open late at night might give rise to the evils which the statute was intended to repress.

It is sufficient for us to decide that where rinking is combined with music it is within the statute.

MELLOR, J. I agree with all that my Lord has said, except that I question whether we ought not to affirm the conviction on the first count as well as on the third.

GROVE, J. I am of the same opinion as to the third count. Rinking may be analogous either to skating or to dancing. When it takes place in a room, and to music, I think it of the same kind with dancing; if not, I can imagine nothing that is. If the first count had stood alone, I should have been prepared to affirm the conviction upon it also. But having regard to the acquittal on the second count, I think such an affirmance, though technically correct, might, in effect, pervert the finding of the jury.

LINDLEY, J. On the third count I feel no doubt whatever. As to the first count, for the reasons which have been already stated, I should not be prepared to affirm the conviction.

HAWKINS, J. I agree with my Lord upon all points.

Conviction affirmed.

Solicitors for prosecution: *Beard & Son.*
Solicitor for defendant: *P. B. Cunningham.*

[IN THE COURT OF APPEAL.]

1877
April 27.

METCALFE *v.* THE BRITANNIA IRONWORKS COMPANY.

Charterparty—Freight—Voyage not completed—Freight pro ratâ.

A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th of December, at Kertch, which was as near as he could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; and they on the 27th of December delivered it to the agent of the railway company on his producing written authority from the company, together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the charterparty and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight:—

Held, affirming the judgment of the Queen's Bench Division, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty; secondly, that the plaintiff was not entitled to freight pro ratâ, as no new contract for such freight had been made.

CASE stated without pleadings. (1) The material facts were as follows:—

By a charterparty made in October, 1873, between the plaintiff, owner of the steamship *Meredith*, and the defendants, it was agreed that the ship should load at Middlesborough-on-Tees a cargo of railway iron, and proceed to Taganrog, or as near thereto as she might safely get, and deliver the same afloat on being paid freight at a given rate per ton. The ship accordingly went to Middlesborough, and there took on board the railway iron from the agents of the defendants, and proceeded on her voyage. She reached Kertch, at the entrance of the Sea of Azof, on the 17th of December, and then found the buoys removed and the navigation to Taganrog closed for the winter. The captain thereupon proposed to discharge the cargo at Kertch, and made a protest in which he

(1) The case will be found fully set out in 1 Q. B. D. 613.

1877

METCALFE v. BRITANNIA IRONWORKS COMPANY.

said that he determined to do so, Kertch being the nearest port to Taganrog which the steamer could safely approach; and he gave notice accordingly to Messrs. Berthold & Co., the agents at Taganrog for the defendants, and also for a Russian railway company, the consignees of the iron. Messrs. Berthold & Co., by telegram, told the captain that if he discharged at Kertch he would be liable for infraction of the charterparty. The captain, however, proceeded to discharge the iron, and delivered it to the custom-house authorities at Kertch. Soon afterwards an agent for the consignees producing the bills of lading, and acting under a power of attorney from the railway company, obtained possession of the iron from the custom-house authorities without payment of any freight, and notwithstanding the captain's claim for freight, giving the captain a simple receipt for the iron. The cargo was in due course received by the company.

The shipowner brought an action to recover the freight, and the Queen's Bench Division gave judgment for the defendants (1), Mellor and Quain, JJ., holding that the plaintiff was not entitled to any freight; Cockburn, C.J. dissenting, and holding him entitled to freight pro ratâ.

The plaintiff appealed.

On the argument before the Queen's Bench Division it was supposed and assumed that Kertch was about thirty miles from Taganrog. On the appeal it was stated and admitted that Kertch is distant from Taganrog 300 miles by sea and 700 miles by land; that there was no railway communication between these places, and that the means of land carriage were very defective.

Cohen, Q.C. (*Beresford* with him), for the plaintiff, cited *London and North Western Ry. Co.* v. *Bartlett* (2), *Cork Distilleries Co.* v. *Great Southern and Western Ry. Co.* (3), and *The Soblomsten.* (4)

Watkin Williams, Q.C. (*Hollams* with him), for the defendants, cited *Luke* v. *Lyde.* (5)

Cohen, Q.C., in reply.

(1) 1 Q. B. D. 613.

(2) 7 H. & N. 400; 31 L. J. (Ex.) 92.

(3) Law Rep. 7 H. L. 269.

(4) Law Rep. 1 A. & E. 293.

(5) 2 Burr. 882; 1 W. Bl. 190; S. C. nom. *Luke* v. *Lloyd.*

1877

METCALFE v. BRITANNIA IRONWORKS COMPANY.

LORD COLERIDGE, C.J. In this case there was a difference in the Court below, upon the question whether the plaintiff was entitled to freight pro ratâ for so much of the voyage as had been completed. I think that there was not any difference in the Court below upon the question whether the whole of the freight was due. Those are the two questions before us.

The facts are few and simple. The ship was to take iron railway bars from Middlesborough to Taganrog, or as near thereunto as she might safely get; one third of the freight was to be paid on signing the bill of lading, and the balance in cash in London against a certificate of right delivery of cargo. The ship got to Kertch, which is at the entrance of the Sea of Azof, Taganrog being at the other end of the Sea, and the distance between them is now allowed to be about 300 miles by sea, and 700 miles by land. It is admitted that the captain was right in stopping at Kertch; the buoys had been taken up, and practically the navigation of the Sea of Azof was closed for the winter; therefore, as I understand it, there was an absolute physical obstruction by means of ice—at all events, there was enough to justify the captain in stopping at Kertch. He then proceeded to discharge the cargo, and in a protest he states what are the circumstances. [The Lord Chief Justice then read the protest. (1)] This, I apprehend, is a clear statement that the captain considered the voyage at an end within the terms of the charterparty, and so discharged the cargo at Kertch as being the nearest point to Taganrog to which he could get. The consignees at once gave him notice that he was not fulfilling the charterparty, and that though they could not prevent him from discharging the cargo, they did not accept it. The cargo was, however, landed and remained some time in the keeping of the custom-house authorities. Then an agent of the consignees came to Kertch with a power of attorney from the consignees, and required the Russian authorities to give up the cargo, which was done, though the captain required them to retain it until the freight was paid. In order to obtain possession of the iron, the agent of the consignees gave the captain a receipt. It is said, first, that the plaintiff is entitled to the whole freight; and, secondly, that though this state of things may not justify the

(1) 1 Q. B. D. at p. 615.

1877

METCALFE v. BRITANNIA IRONWORKS COMPANY.

plaintiff in demanding the whole freight, yet it does justify the proposition that the plaintiff is entitled to freight pro ratâ.

On the first point the Court below decided unanimously against the plaintiff, and we are of opinion that the Court below was clearly right. It is not necessary to say more than that the obstruction was only temporary, and is such as must be incident to every contract for a voyage to a frozen sea, and it cannot be said that in all these contracts the words "at that time," or "then and there," are to be inserted after the words "as near thereto as the ship can safely get."

But then it is contended that, at all events, the plaintiff has a right to freight pro ratâ. That right, as I understand it, must depend on the rule laid down by a great authority, Baron Parke, in *Vlierboom* v. *Chapman*. (1) He says, "The true principle upon which this description of freight is due is that a new contract may be implied to pay it from the acceptance by the consignee of his goods delivered at an intermediate port instead of the destined port of delivery." Therefore to render freight due it must be shewn either that there has been a presumptive fulfilment of the old contract, or that a new contract between the parties must be implied, for two persons other than the original parties could not make any modification of the original contract. The learned judge then goes on to state the doctrine from Mr. Justice Story's edition of Abbott on Shipping, p. 329 that to justify a claim for pro ratâ freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with. That must mean "dispensed with by some one who had authority from the original consignor," and in that case there was no third party, the consignor and the consignee being in fact the same person, so that the statement was quite accurate. Baron Parke goes on to say that there was in that case no reasonable ground for inferring a new contract, "for the shipowner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage, and accept the delivery at the intermediate instead of the destined port," meaning

(1) 13 M. & W. 230, at p. 238.

clearly that the contract to be implied must be between the same parties as those who made the original contract.

These being the principles upon which freight pro ratâ can be earned, how do the facts here apply? In the first place, there was no acceptance amounting to a voluntary acceptance by the consignee at the substituted port. The goods were finally discharged against the protest of the consignees, and they had to consider what to do, whether to leave them alone or to take them at this place, which they must do if they were to get them at all. They took them, and the captain not attempting to qualify his absolute discharge, said in fact that he had completed the voyage and claimed the freight. But he had no right to do this when he had not fulfilled the contract; and taking the goods in spite of this claim cannot amount to a voluntary acceptance under the charter-party, or to making a new contract to pay freight. The question whether the consignees could make an agreement which would bind the consignors does not arise here; and the facts of this case when properly looked at do not come within the conditions upon which alone pro ratâ freight is given. It was suggested in the Court below, that upon some general principle of the law merchant, quite apart from an express contract, freight pro râta is always due where the voyage has been partly performed, and the decision of Lord Mansfield in *Luke* v. *Lyde* (1) was given as the authority. I do not consider it necessary to discuss that authority, for I do not read the facts of this case as I understand the Lord Chief Justice to have read them. In my opinion there was here no dispensation with further carriage or voluntary taking of the goods, and I must respectfully differ from the conclusions of fact, if they are conclusions, of the Lord Chief Justice. In some parts of his argument he seems to put forward a sort of general equity that a shipper should pay pro ratâ for so much of the carriage as he has had the benefit of. This appears to me to have been founded upon the supposition that the two ports were so near as to make it of little consequence at which the goods were delivered, and to bring the case within the authority of those cases where there was practically no difference between them. It seems to have been assumed that Kertch and Taganrog were very near. This was

(1) 2 Burr. 882.

1877

METCALFE v. BRITANNIA IRONWORKS COMPANY.

hastily conceded by both sides, and the Court adopted the concession and proceeded on a wrong state of facts.

Upon these grounds, therefore, it appears to me that the judgment of the majority in the Court below is correct, and ought to be affirmed.

BRAMWELL, L.J. I am of the same opinion. The plaintiff cannot shew that he has performed the conditions precedent to his right to recover under the charterparty, and he must therefore, in order to succeed, shew either a dispensation or a new contract, whether he seeks to recover the whole freight or freight pro ratâ.

I think that the consignees might have dispensed with the full performance of the contract, if it had suited them, when the ship touched at Kertch, to have the iron landed there and carried no farther. I think that is so, but I do not affirm it definitely. The plaintiff must, however, make out his case in point of fact, and it is for him to shew that he has performed his contract, or that there has been a dispensation. To my mind, there is no evidence that the consignees dispensed with the voyage to Taganrog. The captain landed the iron under a mistaken notion that he had a right to land it, and need not carry it farther. He claimed the freight, and from first to last shewed no intention to come back in the spring or to send on the iron by another ship, but claimed a right to leave the goods at the risk of the consignees. I agree that by stopping at Kertch he had not broken the contract, because he could not get any farther, but I think that landing the goods in that way was a breach of the contract; nor is it necessary to refer to *Hochster* v. *De La Tour* (1) and similar cases for authority on that point. But, at all events, when he had landed these goods, and had said, "There are the goods, and you must pay the freight," he certainly gave the consignees a right to take them away; in fact, he obliged the consignees to take them. It was argued that the captain had no authority to do this; but that does not affect the case.

As to the argument that the consignees took them voluntarily, no doubt they did so in one sense, just as a man turned out of a

(1) 2 E. & B. 678; 25 L. J. (Q.B.) 455.

hackney cab instead of being carried to the end of his journey, would probably walk away, though of course he might sit down on a doorstep and wait for the cabman to carry him on. No doubt the consignees might have left the goods there, but they took them away because they could not help it. The telegram indicates no consent, nor does the receipt, and throughout the case there is an entire absence of any sign of acquiescence. What reason was there why the consignees should say, "You cannot get further than Kertch; we do not care; we shall have to pay the carriage from Kertch, but still we will pay you the whole freight." Why should they not have said to the captain, "Go away if you choose, but you must not ask us to pay the full freight, as we shall have to carry the cargo to Taganrog?" What the consignees did might not have been very generous, but it was very discreet. They said, "Land your cargo if you like, but take the consequences." It is clear that there was no dispensation from the full performance of the contract.

As to the claim for freight pro ratâ, that can only be made under a new contract. But certainly there was no new contract with the charterers, and the new contract, if any, was with the consignees, who had no power to bind the charterers. But, in my opinion, there was no new contract; the observations I have made as to the full performance of the contract not having been dispensed with, shew that there was no new contract. The argument that there was, put shortly, is this: It is said that, because the captain broke the old contract, there must be a new contract implied. I do not blame the captain for breaking the contract; he was in a difficult position, and there was no mala fides on his part; but still he broke it, and there was no new contract to pay freight pro ratâ, and if there was, it did not bind the charterers.

Upon these grounds, my opinion is that the judgment of the majority in the Court below ought to be affirmed. It is due, however, to the Lord Chief Justice to shew why I do not agree with his judgment. He seems to have proceeded upon two grounds: one, that a new contract ought to be implied, but he does not advert to the difficulty that the consignees had no power to

1877

METCALFE v. BRITANNIA IRONWORKS COMPANY.

make a contract which would bind the charterers. He refers to many cases where the shipowner has been prevented from performing the contract without any fault on his part, and he says (1), "Ought we not to imply an undertaking to pay for the carriage of the goods as far as it has gone?" The answer I give is that that is not the present case. Whether we ought in any of the cases put by him to imply a new contract, is a difficult question to answer. In some no doubt we ought, but there are many cases in which we ought not. The Lord Chief Justice, further, seems to have considered that the consignees compelled the master to give them the cargo, but on the evidence I have, with all due respect, come to a different conclusion. He further says that they ought to have given the shipowner a locus pœnitentiæ, and not to have prematurely seized the cargo; but suppose that, instead of this being iron, it had been corn or sugar, or any such cargo, could the shipowner then expect a locus pœnitentiæ, and ought the consignees to leave the goods to perish? It seems to me that the law cannot be so, and that the consignees were obliged to act as they did. It is said that these cases are hard, and that we ought always to imply such a contract as they ought to have made; but if the parties choose they can always provide for this case in the charterparty, and I should be much surprised to see a clause inserted, "If the captain breaks the charterparty, freight shall be paid pro ratâ," and yet that is what we are asked to suppose the charterers to have acceded to. In my opinion the judgment appealed against is right.

BRETT, L.J. The shipowner here claims full freight, or, if not, freight pro ratâ, but it appears to me that he is not entitled to either. The charterparty is in the ordinary form, which has often been construed, and we must hold, as a condition precedent to the recovery of anything as freight under the charterparty, that the goods shall have been carried to the port of destination, or as near thereto as the ship can safely get. Nothing, therefore, can be recovered under this charterparty unless the agreement has been performed, or the performance has been waived by the charterers or

(1) 1 Q. B. D. at p. 620.

by some one authorized by them. Now, construing this charterparty as well as we can, it is obvious that the condition has not been fulfilled; nor was it waived by the charterers, nor, for reasons already given, can we hold that it was waived by the consignees. It seems to me clear that the consignees only took the goods because the captain had left them, and had declared that he would not carry them any farther. It is true that the consignees were not obliged to treat this declaration as final, but they had a right so to treat it. And even if they had believed that they had a right to waive the performance of the charterparty, they would not have bound the charterers so as to make them liable. The consignees were not the agents of the charterers, and could not bind them. They might, if they chose, accept the goods at a place short of the port of destination, and possibly in that case the charterer could not bring an action against the shipowners for not having duly carried the goods; but it does not follow that the shipowner earns his freight because the consignee takes the cargo. If the consignee does take delivery at another port, the question depends upon the terms on which he has taken it. He may have bound himself to the shipowner, but that is a new contract between them, and not with the charterer. The only thing which can make the charterer liable is a substantial fulfilment of the charter, or a waiver by the charterer or his authorized agent. It appears to me that the charterers here are not liable, and that even if the consignees had waived the full performance, that would not bind the charterers and make them liable.

As to the claim for freight pro ratâ, the Lord Chief Justice seems to think that the case of *Luke* v. *Lyde* (1) determines that, by a principle of maritime commercial law, apart from any contract between the parties, the merchant is bound to pay freight pro ratâ, if he accepts the delivery at any place short of the destination when, without any default on the part of the shipowner, but through the operation of a vis major, he is prevented from carrying the goods farther. The Lord Chief Justice, having extracted that proposition, proceeds to shew that the other cases bear out that conclusion, or can be distinguished. But I cannot say that

(1) 2 Burr. 882.

1877

METCALFE v. BRITANNIA IRONWORKS COMPANY.

by the law of England liability to pro ratâ freight can arise, except on a new contract. If it is necessary to make a new contract, that may be made between the owner and the charterer, or between the owner and the consignee, and may be express or implied. But here there was no express contract between the charterers and the shipowner to pay pro ratâ freight, and there are no facts from which any such contract can be inferred. Neither is there any express contract between the shipowner and the consignees, and, for the reasons which have been already given, I think there are no facts, as between the shipowner and the consignees, from which any contract for pro ratâ freight could be implied according to the ordinary doctrine in such cases. Therefore the plaintiff has no contract with any one. But if such a contract could have been implied between the plaintiff and the consignees, it would not have enabled the plaintiff to sue the charterers. The consignees were no more the agents of the charterers to bind them to pay freight pro ratâ than they were to waive the charterparty altogether. If therefore the plaintiff is entitled to pro ratâ freight, that is as between him and the consignees, and not as between him and these defendants; as between him and them he cannot be allowed to recover the charterparty freight because he has not performed the conditions precedent. I am therefore of opinion that the judgment of the majority of the Court below was right, and ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *C. C. Ellis & Co.*
Solicitors for defendants: *Hollams & Co.*

LASCELLES AND ANOTHER *v.* LORD ONSLOW AND ANOTHER.

1877
Feb. 6.

Manor—Common of Turbary—Common of Estovers—Appropriation by Lord of portion of Waste—Evidence of Custom allowing Lord to approve—Grant of Turbary and Estovers as appurtenant to enfranchised Hereditament, but subject to Customs of Manor—Evidence of Custom for Lord with consent of Homage to grant Parcels of Waste—Freeholders bound by consent of Homage of Copyholders—Evidence that sufficient Common of Pasture has been left after Inclosure.

Where the lord of a manor has appropriated by leasing and also has granted out by copy of court roll portions of the waste, the fact that there has been a sufficiency of common of pasture during ten years is evidence, that the inclosures have not interfered with the rights of the commoners.

In 1751 the lord of the manor of C. demised a brick-kiln then standing on the waste thereof, with liberty to inclose a piece of land not exceeding half an acre, and to dig earth for the use of the kiln; this lease, after its expiration, was renewed from time to time, and meanwhile leases of other parts of the waste were granted for the purpose of erecting thereon kilns and of digging clay. During the currency of the lease made in 1751 presentments were made by the homage of encroachments on the waste by strangers; but no objection was made to the granting of the leases, and the commoners bought bricks at the kilns:—

Held, that the granting of the leases ought to be referred to a legal origin, and that there was evidence sufficient to establish that the lord of the manor had by custom the right to approve, so that he left a sufficiency of turbary and estovers to the commoners.

By a deed, made in 1614, certain copyhold land of the manor of C. was enfranchised, and thereby the lord granted to G. M. "all and all manner of turbaries, digging and carrying of turfs, estovers, and common of estovers, heath, and fern . . . . in such sort, nature, quality, and condition as the freeholders and tenants in free socage of the said manor, within the parish of C. aforesaid, have used and enjoyed the same":—

Held, that the terms of the deed afforded no evidence that at the time of its execution the freeholders of the manor had larger rights of common than the copyholders: and

Held, further, that the deed did afford evidence that the grant of common of turbary and estovers to G. M. was made subject to the customs of the manor; and, therefore, that the lord could approve as against the successor in title of G. M.

The court rolls of the manor of C. contained twelve entries relating to grants by the lord of parcels of the waste; the entries commenced in 1664 and ended in 1858 (with a break of many years), and in ten of them it was stated that the homage consented to the grant; the land included in the whole of these grants amounted to rather more than 51 acres, the extent of the waste being about 4500 acres. The homage was composed wholly of copyholders:—

Held, that the entries afforded evidence of a custom within the manor to grant parcels of the waste with the consent of a homage of copyholders, and that the custom was valid as against the freeholders having rights of common over the waste.

SPECIAL CASE stated by an arbitrator under a master's order in an action, in which Rev. R. Lascelles and E. H. C. Clarke were

1877

LASCELLES v. LORD ONSLOW.

plaintiffs and the Earl of Onslow and R. Lawrence defendants. The writ was dated the 31st of March, 1876. The following are the material facts:—

1. The plaintiffs were entitled to the reversion in a messuage and lands called Halebourne Farm, occupied by J. Ottaway as tenant to them, and containing about twenty-nine acres.

2. The Earl of Onslow, the defendant, was lord of the manor of Chobham, in the county of Surrey, of which a waste called Chobham Common was parcel.

3. The freehold of the plaintiffs' lands was, with other lands in the parish of Chobham, conveyed in an indenture on the 20th of July, 1614, by Sir George More, then lord of the manor of Chobham, together with certain rights of common over the waste, to George Marten, and all the interest of George Marten in the same, subject to the tenancy of J. Ottaway, vested in the plaintiffs by a deed dated the 11th of October, 1869.

5. The plaintiffs claimed to be entitled to rights of common of pasture, of turbary, and of estovers as appurtenant to their messuage and lands.

7. Chobham Waste or Common contained about 4500 acres, and the area of the inclosed arable and grass lands in the parish of Chobham was 4330 acres, whereof 2658 acres were arable, and 1672 acres were grass land. The freehold and copyhold tenants of the manor of Chobham were entitled to common of pasture for themselves or their tenants over the waste, for all the commonable cattle, levant, and couchant in and upon their messuages and lands, and to common of turbary and common of estovers. The number of copyhold tenants was stated to be sixty-nine, and the extent of the copyhold tenements less than 300 acres; but there was no evidence as to the number of the freehold tenants of the manor, or as to the size of their tenements. Besides the freehold and copyhold tenants of the manor, the parishioners of Chobham had, for a period commencing from a time beyond living memory, and without interference on the part of the lord of the manor, exercised the same rights of common over the waste, and the notion had prevailed among the parishioners that every ratepayer was, as ratepayer, entitled to such rights.

8. One class of parishioners, who had used the common by them-

selves or their tenants for pasture, turbary, and estovers, were the owners and occupiers of the freehold lands within the parish, but not parcels of the manor. These persons had so used the common for a period commencing from a time before living memory, and there was no evidence that they had ever been interfered with in such user of the common by the lord of the manor.

9. The turves fit for burning consisted of the roots of the heather growing upon the common. Furze or gorse grew on some parts of the common, and a large quantity of it was cut by the inhabitants, the owners and occupiers of land and houses in Chobham, and was used by them for the purpose of fuel, forming the bottoms of stacks, making rough fences, and mending roads.

12. Leases of parts of the waste, where the soil was clay land, had been from time to time granted by the lord of the manor to brick-makers and others, for the purpose of their erecting thereon brick-kilns and other buildings necessary for brick-making, and of digging clay to make bricks with.

13. The earliest lease produced on behalf of the defendants was a lease made the 11th of December, 1751, whereby the then lord of the manor demised to Robert Stevens for ninety years from Michaelmas, 1750, at the annual rent of 10*s.* 6*d.*, "all that brick-kiln, with all the sheds, erections, and buildings whatsoever, situate and being on a certain place on the waste of the said manor of Chobham, called Valley Wood, with full and free liberty to Stevens to take in and inclose a piece or parcel of the waste there not exceeding half an acre, to erect such other buildings thereon as he should think necessary, and to dig and take such brick and tile earth on the common as he should think necessary for the use of the kiln."

14. In the memory of living witnesses the kiln mentioned in the last-mentioned indenture was abandoned, and a new kiln was built upon the portion of the common expressed to be demised in and by the indenture of the 1st of November, 1860, hereinafter mentioned, being the kiln therein referred to, and the kiln was erected, and the land adjoining thereto was worked, and clay was dug and worked on the common by the assignees of the term created by the indenture of the 11th of December, 1751, and under and by virtue of the rights, powers, and authorities sup-

1877

LASCELLES v. LORD ONSLOW.

posed to be created thereby. It was proved that the commoners had purchased bricks at the kiln.

15. After the expiration of the term created by the indenture of the 11th of December, 1751, the then Earl of Onslow, lord of the manor of Chobham, by deed dated the 1st of October, 1853, demised to James Stevens "all that brick-kiln and land used therewith, containing two acres or thereabouts, situate, lying, and being at Valley Wood, on Chobham Common, for the term of seven years from the 29th of September, 1853, at the rent of 10*s.* 6*d.*"

16. Upon the expiration of the term created by the deed last-mentioned, by indenture dated the 1st of November, 1860, the Earl of Onslow demised to James Stevens and his assigns, the brick-kiln and land comprised in the indenture of the 1st of October, 1853, by the description of "all that brick-kiln and the land used therewith, containing two acres or thereabouts, situate, lying, and being at a certain field called the Valley Wood, on Chobham Common; and also all those buildings and premises used with the said brick-kiln, namely, a feeding-house, two long tiled sheds, tile pit and sheds, two long brick drying sheds and a large cart-house; and also free and full liberty for him, and his assigns, to dig and take brick earth and tile earth off and from all that piece or parcel of waste land of the manor of Chobham, adjoining the above-mentioned two acres, and containing about three acres, more or less; and also full liberty of ingress and egress and regress into and out of and from the last-mentioned three acres of land or any part thereof, with horses, carts, waggons, and other carriages as shall be necessary for taking, conveying, or carrying away the brick and tile earth, &c.," for the term of twenty-one years from the 29th of September, 1860, at the annual rent of 12*l.*

17. On the 28th of February, 1866, the lease last-mentioned was assigned by James Stevens to R. Horwood and J. Horwood, as trustees for the defendant Lawrence. The brick-kiln, sheds, and buildings mentioned in this indenture were situated on Chobham Common.

18. By indenture dated on the 1st of March, 1865, the Earl of Onslow demised to R. Horwood and J. Horwood, and their assigns, all that piece of land situated in the parish of Chobham,

Surrey, and being part of the waste of the manor of Chobham, and containing by estimation five acres, and which piece or parcel of land was nearly opposite to Stevens' brick-kiln; and also full and free right and liberty for them, R. and J. Horwood, and their assigns, to dig and take such clay and brick earth and tile earth in the land as he or they should think needful or necessary for the purpose of being converted into bricks and tiles, either in clamps on the demised premises or in the kiln or kilns to be erected thereon, for the term of twenty-one years, from the 25th of December, 1864, at the annual rent of 25*l*. R. Horwood and J. Horwood became such lessees as trustees for the defendant Lawrence.

19. In the last-mentioned lease there was a covenant by the lessees that they would not in digging or excavating clay, brick earth, or tile earth, do any needless damage to the demised land, but would from time to time, at their own cost and charges, immediately after they should have gotten and exhausted the clay, brick earth, and tile earth from any part or parts of the demised premises, fill up, level, and lay down the same with grass seeds in a husbandlike manner.

20. On a part of the common other than that included in the above-mentioned leases, namely, at the extreme end in the north-west corner thereof, there had been a brick-kiln in existence for at least seventy years. Very few persons formerly lived in the neighbourhood of the kiln, which was on the side of the common farther from where the village of Chobham was situated. By indenture made on the 30th of September, 1858, the lord of the manor demised this brick kiln and buildings and sheds used with it, therein described as late in the occupation of Joseph Luff, to Joseph Rouse for fourteen years from Michaelmas, 1858, with full liberty to the lessee to dig and take such brick earth as he should think needful for the use of the kiln.

21. There had also been other leases of other portions of the waste by the lord of the manor of Chobham to other persons for the purpose of digging clay and brick earth upon the common, that is to say, a demise of eight acres of the waste by the Earl of Onslow to J. Catlin for twenty-one years from the 29th of September, 1858, contained in an indenture dated the 28th of September, 1858; the eight acres were stated in the lease to have

1877

LASCELLES v. LORD ONSLOW.

lately been inclosed from the waste by the earl, and to be in the occupation of J. Catlin; a demise of two acres of the waste then in the occupation of J. Chaman by the Earl of Onslow to Lord Abinger for seven years from the 29th of September, 1859, contained in an indenture dated the 20th of October, 1859; a demise of two acres of the waste by the Earl of Onslow to C. E. Noble, stated to be then in the occupation of C. E. Noble, for fourteen years from the 29th of September, 1867, contained in an indenture dated the 17th of September, 1867.

22. Although on some of these demised portions clay was no longer dug, there was no proof that until the interference of Sir Denis Le Marchant, hereinafter mentioned, any commoner or other person interfered with the persons digging the clay or making the bricks under the provisions of the leases. Commoners and parishioners had bought bricks at the kilns.

23. In the demise to C. E. Noble there is a covenant as to levelling the land, similar to that contained in the demise to R. Horwood and J. Horwood.

24. The defendant Lawrence, shortly after the date of the lease of March, 1865, entered upon the portion of the waste thereby demised, and built two brick-kilns thereon, and commenced working and digging clay on the demised premises. Soon after he had commenced his operations, Sir Denis Le Marchant, who resided about half a mile from the demised premises, and who objected to a brick-kiln being worked so near to his residence, and who claimed to have rights of common over the waste, threatened to bring an action against the defendant Lawrence, if he did not remove his brick-kiln to some other part of the waste. Rather than be engaged in litigation, and after certain communications with Sir Denis Le Marchant, which came to nothing, the defendant Lawrence procured the assignment from Stevens above-mentioned, and gave up, and had since discontinued his workings on the part in respect of which Sir Denis Le Marchant made his objection, Lord Onslow having undertaken not to demand any rent for the same while the workings were discontinued. At the time these workings were discontinued, the plaintiffs were not seised of their reversion in the premises in respect of which they brought the present action.

25. The term created by the indenture of the 1st of March, 1865, had not been surrendered. It was the intention of the defendant Lawrence, if this lease of 1865 should have been lawfully granted, to continue his workings for clay in the pits. Before he so discontinued working, the defendant Lawrence dug several trial holes in part of the waste not included in either of the above leases which he did not fill up.

26. In the year 1866 the defendant Lawrence, having entered into possession of the portion of the waste demised by the indenture of the 1st of November, 1860, commenced working and digging for clay in that portion, and erected upon it a brick shed adjoining to the old kiln, for the purpose of manufacturing bricks in bad weather. He also dug pits, and took clay, and made bricks, both on the two acres and the three acres included in that lease up to the present time. He had also, before the commencement of the present action, erected a new kiln and chimney upon the demised premises for the purpose of burning bricks made from clay dug from the premises. The working and digging clay had destroyed the heather growing upon the surface of the common upon the sites of the workings, the roots of which, as before mentioned, were used as turves for fuel. In the course, and for the purpose of his brick-making he had used large quantities of the furze growing on the common, part of which he had ordered to be cut, the other part he had bought from persons who cut it for the purpose of sale. The diminution of the furze growing upon the common by the amount so used by Lawrence, was not such as to cause any insufficiency of estovers. The occupiers of the brick-kilns before mentioned had, as far back as living memory extended, cut the furze growing on the common for the use of the kilns.

28. The whole area of the portions of the waste, which at the commencement of this action were being used for making bricks and were still so used, was about fifteen acres. The pits dug by the defendant Lawrence in the portion demised by the indenture of the 1st of March, 1865, which he discontinued working as heretofore stated, the pits on the portion demised by the lease of the 1st of November, 1860, and the pits included in that portion demised to Rouse where the workings for bricks had for many years been discontinued, were still open. It was possible that cattle

1877

LASCELLES v. LORD ONSLOW.

or sheep might fall into one or other of these pits, especially into the pits dug in the portion demised to Rouse, which lay in a distant part of the common where animals were seldom taken to feed; but, as a matter of fact, nothing of the kind had happened for several years before this action, nor was there any evidence that anybody had ever abstained from using the pasture on the common because of the pits.

29. J. Ottaway, who became the plaintiffs' tenant in 1869, had not turned out any animals on the common from the commencement of his tenancy except in the summer of 1873, when he turned out some sheep. His father, however, who was tenant of the farm for thirty-six years before 1869, had, from time to time, during the tenancy turned out sheep and cattle upon the waste, and had cut and caused to be cut turves and gorse for fuel during the same period. J. Ottaway had also cut turves every year during his occupation.

30. From time to time the lord of the manor for the time being had made grants of small portions of the waste to be held as copyholds; these portions were chiefly but not entirely frontages, that is, pieces of the waste lying between the land of the grantee and the high road. The entries in the existing court rolls of the manor begin in 1663, the earlier rolls having been lost. The earliest entry in the court rolls of such a grant was dated the 18th of October, 1664, when two such grants were made; there was another such grant in 1670 and another in 1672. The land included in the whole of these grants amounted to 51*a.* 1*r.* 2*p.* These grants had been made by the steward of the lord of the manor with the consent of the homage at general courts baron, held for the manor, the homage being represented by a jury of copyholders, usually twelve, but sometimes a smaller number. The copyholders only were sworn on and constituted the homage at these courts. Occasionally a copyholder who formed one of the homage was also a freeholder, but he attended and served on the homage in his character of copyholder.

By the form of precept used in the manor of Chobham the bailiff was required by the steward to give notice and warning that a general court baron would be holden in and for the manor at a specified place, day, and hour, "when and where all the

tenants of the said manor are required to attend and perform suit and service, and to pay all arrears of quit rent due for the lands and tenements they hold of the said manor." In the form of notice, issued by the bailiff pursuant to the precept of the steward, it was stated that a general court baron of the lord of the manor would be holden before the steward at a specified place, day, and hour, "when and where all the tenants of the said manor are required to perform suit and service and to pay all arrears of quit rents due to the lord for the lands and tenements they hold of the said manor; and when and where all persons having other business to transact at such court are also required to attend."

31. In consequence of a different breed of sheep being kept for several years before this action by the farmers and others, who had been in the habit of turning out their cattle and sheep on the common, and of the feed on the common not being suitable to such breed, the number of animals so turned out had for many years before this action considerably decreased; some farmers having ceased to turn out and others turning out fewer animals than formerly, and notwithstanding the grants and leases for brick-making there had been sufficient pasture for the average number, which had for the last ten years at least been turned out. In a dry season the pasture might be insufficient, but it would be insufficient even if there had been no grants and no leases or licences for brick-making. There had always been a sufficiency of turf.

32. Except so far as the Court might infer damage from the facts above stated, there was no evidence that any special or particular damage had been done to the plaintiffs' reversion by the acts of the defendant Lawrence. It was not proved that in consequence of those acts the reversion would sell for less, or that a less rent could be obtained for the lands held by Ottaway.

The Court was requested to draw inferences of fact. The questions for the opinion of the Court were:—First, whether upon the facts stated, the plaintiffs had any and which of the rights of common which they claimed: Secondly, whether the defendant Lawrence had been guilty of any and what disturbance of those rights if they existed: Thirdly, whether the defendant Lawrence was entitled to resume working and digging for clay under the demise of the 1st of March, 1865: Fourthly, whether there had been any legal injury to the plaintiffs' reversion: Fifthly, whether

1877

LASCELLES v. LORD ONSLOW.

the freeholders of the lands within the parish but not the parcel of the manor, were entitled to common of pasture, turbary, and estovers on the common: Sixthly, whether, the lord was entitled to grant the several leases mentioned in the case; Seventhly, whether the entries on the court rolls and the facts stated, with reference to the grants of parcels of the waste by the lord with the consent of the homage, established a lawful custom to make such grants as against the plaintiffs; Eighthly, whether the entries and facts established any and what lawful custom to make grants of parcels of the waste.

The indenture mentioned in the third paragraph of the special case was dated the 20th of July in the 12th year of James I., and thereby Sir George More, in consideration of the sum of 20*l.*, bargained, sold, granted, aliened, enfeoffed, and confirmed unto George Marten, his heirs and assigns, a messuage and lands situate in the parish of Chobham, and late George Collyer's, "all which premises with the appurtenances now are, or late were, parcel of the manor of Chobham, in the county of Surrey, and holden of the said manor by copy of court roll, according to the custom of the said manor, at the will of the lord of the said manor, by the yearly rent of 2*s.* 8*d.* and other service for the same due and accustomed." The grant, in express terms of turbary, estovers, and pasture, is set out in the judgment of the Court, and at the conclusion of the grant of the parcels, reversions, and deeds, the indenture proceeded thus: "All which premises with the appurtenances by these presents mentioned to be bargained and sold, granted, aliened, enfeoffed, and confirmed, the said Sir George More late had and purchased in fee-farm with and amongst divers others things of our said sovereign lord, the King's Majesty that now is, to be holden of his Majesty, his heirs and successors, as of his manor of East Greenwich, in the county of Kent, by fealty only, in free and common socage (1), and not in capite,

(1) Before 12 Cha. 2, c. 24, by which tenure by knight service was abolished, and turned into free and common socage, upon a grant by the king without the reservation of any tenure or absque aliquo inde reddendo, the land by operation of law was held of him in capite by knight service: *Anthony Lowe's Case* (9 Rep. 122 b); and therefore it was necessary to specify in the grant by King James that the lands conveyed by him to Sir G. More, should be held "by fealty only, in free and common socage, and not in capite, neither by knight's service."

neither by knight's service, as by his Majesty's letters patent under the great seal of England in that behalf made, bearing date at Westminster, the 10th day of May last past before the date of these presents, more at large doth and may appear, to have and to hold all the said messuages or tenements, houses, gardens, lands, tenements, meadows, feedings, pastures, and all and singular other the premises above by these presents mentioned to be granted, bargained and sold, with all and singular their appurtenances to the said George Marten, his heirs and assigns, to his and their own use and uses for ever, to be holden of the said sovereign lord, the King's Majesty, his heirs and successors, as of his said manor of East Greenwich, by fealty only, in free and common socage and not in capite, neither by knight's service, yielding, and paying therefore yearly unto the said Sir George More, his heirs and assigns, the yearly rent of 2*s.* 8*d.* at two feasts in the year usual, that is to say, at the Feast of St. Michael the Archangel, and the Annunciation of the Blessed Lady St. Mary the Virgin, by even portions, and also yielding and paying therefore unto the said Sir George More, his heirs and assigns, at and upon the death of every person dying seised in fee simple, tail-general, or special tail of the said messuage, lands, tenements, and other the premises above by these presents mentioned to be bargained and sold, the sum of 2*s.* 8*d.* for and in the name of a relief, and also doing suit of court at all and every court to be holden for the said manor of Chobham, whereof the said premises by these presents mentioned to be bargained and sold are, or late were, parcel, not exceeding two courts in any one year, as the freeholders and tenants in free socage of the said manor have used or ought to do, so as that no relief or suit of Court be called for or required for the same premises to be paid or done of or unto the said manor of East Greenwich." The indenture contained a power of distress upon non-payment of the rent of 2*s.* 8*d.* and upon non-performance of suit of court, and also covenants for title.

The court rolls of the manor contained entries of three presentments made by the homage of encroachments upon the waste. The first of these presentments was dated the 7th of December, 1827, and alleged that S. Gosden had, "without licence from the lord and tenants, set up a cottage on the waste of this manor,"

1877

LASCELLES v. LORD ONSLOW.

and that he had had notice to pull down and remove the same. The second presentment was also dated the 7th of December, 1827, and alleged that E. Cheeseman had "without licence, inclosed a parcel of waste land, containing by estimation half an acre, and built a cottage thereon, ... and the bailiff is directed to give the said E. Cheeseman notice to throw the said inclosed land into common, and to pull down and remove the said cottage without delay." The third presentment was dated the 21st of March, 1834, and alleged that J. Taylor had, "without licence, inclosed a piece of waste land adjoining his garden, and the bailiff is directed to give notice to the said J. Taylor to throw the same to common."

The court rolls also contained twelve entries relating to grants of parcels of the waste. The first of these entries was dated the 18th of October, 1664, and set forth that, upon the petition of the homage, the lord granted to John Wheatley and his heirs a portion of the waste, to be held by copy of court roll at the will of the lord, according to the custom of the manor, by a certain rent. J. Wheatley paid a fine, and was admitted tenant, and had seisin by the rod. The second entry was likewise dated the 18th of October, 1664, and related to a grant of a similar kind to Lucy Palmer. The third was dated the 4th of October, 1670, and related to a grant of a similar kind to W. Rush, save that the grant was stated to be made simply with the consent of all the homage except one man. The fourth entry was dated the 25th of October, 1672, and related to a grant to W. Young of a similar kind to that mentioned in the third entry, except that it was stated to be made with the consent of all the homage and divers other tenants of the manor. The fifth and sixth entries were dated respectively the 6th of October, 1722, and the 18th of March, 1739, and set forth grants of the waste to J. Pullen and H. Spong respectively; but in them no mention was made of any petition from or consent by the homage. The 7th entry was dated the 30th of April, 1841, and set forth that the homage and tenants of the manor consented and agreed that the lord might grant a piece of ground, parcel of the waste, for the purpose of erecting thereon a chapel of ease, "upon such terms and for such estate as the said lord may think proper." It did not appear on the rolls what grant the lord made

pursuant to the consent of the homage. The eighth entry was dated the 19th of July, 1842; the ninth and tenth the 13th of March, 1843; the eleventh the 23rd of April, 1849, and the twelfth the 21st of May, 1858; each of them related to grants of small portions of the waste, and in each the consent of the homage was stated in a separate memorandum; the parcels were granted in fee, and were to be held by copy of court roll.

Jan. 23, 26. *Cave, Q.C.* (*Kenelm E. Digby* with him), for the plaintiffs. The defendant, the Earl of Onslow, was not justified in leasing any portion of the waste for the purpose of digging clay, and there is no sufficient evidence of a custom within the manor of Chobham to grant parcels of the waste. The claim to grant leases is practically of unlimited extent, and being in its nature unreasonable, is bad in point of law: *Arlett* v. *Ellis* (1). It appears to be plain from the terms of the grant under which the plaintiff's land was enfranchised in 1614, that as to common of pasture, turbary, and estovers, G. Martin, the grantee, was put upon the same footing as the freeholders, who, it must be presumed, were not bound by the customs of the manor; the grant of common is expressed in ample and unrestricted terms, and it is no objection to the plaintiff's claim that claims of a similar nature are (paragraphs 7 and 8) put forward by other persons: *Warrick* v. *Queen's College, Oxford* (2); *Commissioners of Sewers* v. *Glasse.* (3) A direct authority is to be found in *Bullen and Sheene's Case* (4) for holding that the digging of clay by the defendant Lawrence was a wrong sufficient to entitle any commoner to maintain an action. Moreover, it does not clearly appear, upon the facts stated, that sufficient pasture was left for the use of the commoners; and, therefore, it is to be taken against the Earl of Onslow that he has interfered with the enjoyment of their rights, for when the lord of a manor incloses part of the waste, the burden of proof lies upon him to shew that sufficient pasture is left for the use of the commoners: *Arlett* v. *Ellis* (1); *Betts* v. *Thomson.* (5)

(1) 7 B. & C. 346.
(2) Law Rep. 6 Ch. 716.
(3) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.
(4) Godb. No. 437, p. 343.
(5) Law Rep. 6 Ch. 732.

1877

LASCELLES v. LORD ONSLOW.

Joseph Brown, Q.C. (*Meadows White* with him), for the defendants. It is not denied that the plaintiffs are entitled to common of pasture, turbary, and estovers, and therefore the first question put by the arbitrator may be answered in the affirmative; but it is submitted that the Earl of Onslow has not exceeded his rights as owner of the soil. The defendants do not dispute that, before the lord of a manor can inclose any part of the waste without the consent of the homage, he is bound to leave a sufficiency of pasture, turbary, and estovers for the use of the commoners; but the facts stated in the special case shew that this limitation to the lord's rights as owner of the soil has been complied with by the Earl of Onslow, and therefore he is entitled to every other benefit which can be derived from the use of the land: *Arlett* v. *Ellis*. (1) Further, it is immaterial that during a dry season the pasture may possibly be less than is needed by the commoners, for during the last ten years there has always been a sufficiency, and at the time of inclosure it is only necessary to consider what extent is wanted to meet the requirements of the commoners: *Lake* v. *Plaxton*. (2) The present case is distinguishable from both *Warrick* v. *Queen's College, Oxford* (3) and *Commissioners of Sewers* v. *Glasse* (4). The former of these two cases related to the conflicting claims of the lords of a manor and their freehold tenants, there being no copyholders within the manor; whereas here, as appears from the very terms of the indenture of 1614, the land of the plaintiffs, upon enfranchisement, ceased to be parcel of the manor, and was held of the king as of the manor of East Greenwich; and, from the circumstance of there being copyholders within the manor of Chobham, the fair inference is that the grant to G. Marten was subject to the customs existing with respect to them. In *Commissioners of Sewers* v. *Glasse* (4) the question at issue was not as to manorial rights in the proper sense of the term, but as to whether common appurtenant existed within the limits of a forest comprehending many manors. The passage in Viner's Abridgment Common A.a. pl. 33, is a direct authority in favour of the defendants, for it was expressly laid down by King, L.C.,

(1) 7 B. & C. 346, per Bayley, J., at p. 369.

(2) 10 Ex. 196; 24 L. J. (Ex.) 52.

(3) Law Rep. 6 Ch. 716.

(4) Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.

assisted by Jekyll, M.R., in *Filewood* v. *Palmer* (1), that the lord has power to lease the waste for the purpose of digging brick earth; and in *Hall* v. *Byron* (2) it was held that the lord of a manor may take gravel, marl, loam, and subsoil in the waste for his own use and for the purpose of sale, so long as he does not infringe upon the rights of the commoners. The total amount inclosed for the purpose of making bricks is only about fifteen acres out of the waste, which contains about 4500. There is, therefore, nothing unreasonable in the right claimed, and *Hilton* v. *Earl Granville* (3) does not apply to the facts of this case. In *Cooper* v. *Marshall* (4) Lord Mansfield, C.J., after stating that "the lord, by his grant of common, gives everything incident to the enjoyment of it (as ingress, egress, &c.)," proceeds to point out that "the lord still remains owner of the soil, and is not debarred from exercising any act of ownership." In *Sadgrove* v. *Kirby* (5) it was held that a commoner could not justify cutting down trees planted by the lord on the waste, although there were not a sufficiency of common left, but his remedy was by action; and Ashurst, J., said (p. 486), "the lord of a manor may do any act on the common, provided he do not contravene the rights of the commoners."

[LUSH, J. On the other hand, *Perry* v. *Fitzhowe* (6) seems to shew that any unlawful inclosure of a waste may be abated by the commoners as a nuisance, provided that the removal of the encroachment can be effected without the risk of a breach of the peace.]

As to the second, third, fourth, and sixth questions put by the arbitrator, it is contended that the plaintiffs have sustained no specific damage by the inclosure, and therefore they cannot succeed in the present suit; for it is laid down in the Notes to *Mellor* v. *Spateman* (7), that "if the defendant be lord of the manor or put his cattle upon the common with the lord's licence, the commoner cannot maintain an action unless he has sustained a specific injury." This authority applies even more strongly

(1) Mosely, 169.
(2) 4 Ch. D. 667.
(3) 5 Q. B. 701; 13 L. J. (Q.B.) 193.
(4) 1 Bur. 259, at p. 265.
(5) 6 Term, 483.
(6) 8 Q. B. 757; 15 L. J. (Q.B.) 239.
(7) 1 Williams's Notes to Saund. Note 4, p. 627.

1877

LASCELLES v. LORD ONSLOW.

against the plaintiffs, who are only reversioners; moreover, a commoner cannot sue a stranger whose cattle depasture the waste, if the damage be inappreciable: *Robert Marys's Case.* (1) The arbitrator has, in effect, found that the pits dug in the waste have caused no loss to the plaintiffs, and therefore they do not constitute an injury sufficient to maintain the action. Some remarks by the judges in *Bullen and Sheene's Case* (2) may go to shew that digging pits in a waste is of itself an actionable wrong; but they were mere obiter dicta and unnecessary to the decision of the case.

The fifth question need not be answered.

As to the seventh and eighth questions, it is submitted that the entries on the court rolls and the facts stated in paragraph 30 shew a valid custom within the manor of Chobham to grant, with the consent of the homage, parcels of the waste to be held by copy of court roll; and if the copyholders were bound by the grants, the freeholders are likewise bound; for as appears from the language of the forms of precept and notice used within the manor, the freeholders were invited to attend the court and might as such have been sworn upon the homage, if they thought fit. Moreover, as appears from Co. Litt. 58 a, the court baron of a manor may be of a double nature, and then "the court roll containeth as well matters appertaining to the customary court, as to the court baron," that is, "the freeholder's or freeman's court;" therefore the freeholders having common upon the waste were bound by the consent given by the homage of the manor of Chobham.

Cave, Q.C., in reply. By the leases and grants of parcels of the waste the lord derogated from the grant of common contained in the indenture of 1614; this circumstance alone makes them unlawful. It is unnecessary to say that the entries in the court rolls were not evidence against the copyholders of a custom to grant parcels of the waste; but as the homage was composed entirely of copyholders, the entries were not evidence against the freeholders who were not present to object to the proceedings; moreover the custom itself was invalid as against the freeholders.

Cur. adv. vult.

(1) 9 Rep. 113 a. See *Pindar* v. *Wadsworth*, 2 East, 154.
(2) Godb. No. 437, p. 343.

Feb. 6. The judgment of the Court (Mellor and Lush, JJ.), was delivered by

LUSH, J. In order to clear the way for the discussion of the questions of law involved in this case, which was argued before us some days ago by Mr. Cave for the plaintiffs and by Mr. Brown for the defendants, it is necessary to ascertain and determine what is the real effect of the findings of the arbitrator.

That the plaintiffs are entitled to common of pasture, of turbary, and estovers, was not disputed by Mr. Brown. The first question put to us in the case was probably intended to invite our judgment upon the point, whether those rights are absolute, or whether they are subject to the common law or customary rights, if any, of the lord of the manor, upon which we shall have to express our opinion hereafter; or whether or not they are subject to any special limitation. The case finds explicitly that, notwithstanding the leases and the acts done under them by the defendants and their predecessors, there has always been a sufficiency of turf left. It also finds that the acts done were not such as to cause any insufficiency of estovers. As to these, therefore, no actual injury has been sustained, and the only question is whether any legal injury—any injury to the right—has been committed. But as regards the right of common of pasture, the finding is not so explicit. The 31st paragraph states:—[The learned judge read it.] This statement seems to imply that if the tenants had continued to turn out as many cattle as they formerly did, there would not now in ordinary seasons be sufficient pasture left. But it does not say so in terms, nor would it have been conclusive if that had been found as a fact. The rights of the lord, as owner of the soil, are subordinate only to the rights of the commoners. Changes in the mode of managing farms, in the description of cattle kept, and the kind of food given, and in the produce raised, the appropriation of the land to other uses, its conversion into nurseries, hop-gardens, market-gardens, or building ground, or other changes, may permanently diminish the demand of the commoners on the pasture of the common. The right to turn out is measured by the capacity of the commonable tenement to maintain; it is to turn out so many commonable beasts as the winter eatage of the tenement, together with the hay and other produce obtained from it during

1877

LASCELLES v. LORD ONSLOW.

the summer, is capable of maintaining: *Whitelock* v. *Hutchinson* (1), *Scholes* v. *Hargreaves.* (2) There never has been an insufficiency; and in ordinary seasons there will not be, if the average demand for the last ten years is to be taken as a fair measure of the requirements of the commoners for the future. And we cannot see why it should not be. In the absence of any evidence tending to an opposite conclusion, we see no reason for supposing that the requirements of the commoners for the future will be greater than they have been for the last ten years. On the contrary, looking at the situation of Chobham, and the advance of population on all sides, we think that the capacity of the commonable tenements as a whole to maintain commonable cattle is more likely to be a decreasing than an increasing quantity. We, therefore, come to the conclusion that a sufficiency of pasturage has been left, and that the plaintiffs have failed to make out any cause of complaint on this head of claim. We do not lose sight of the rule which casts the onus probandi in such a case on the lord; but the facts found and the considerations to which we have adverted, raise a presumption so strong as to call on the plaintiffs to rebut it. It is a satisfaction to us to know that this is the least important question between the parties. We do not believe that the action would have been brought if it had not been for the more serious questions behind, as the defendants never claimed a right to approve to such an extent as not to leave a sufficiency of pasture.

We now come to the real matter in contest, namely, whether the lord of the manor has or has not a right to lease off portions of the common for brick-making. We agree with the counsel for the plaintiffs that the lord of a manor is not, of common right and in virtue of his ownership of the soil, entitled to approve against common of turbary or estovers. Whether he may take away the brick-earth, or license another to take it to any extent, so that he leaves sufficient pasture, turbary, and estovers for the commoners, is not the question; for this is not what the lord has done. He and his predecessors have appropriated portions of the common by leasing them, which is virtually taking them out of the common, and which may for ever exclude the commoners from the exercise of their rights over these portions. This is not

(1) 2 M. & R. 205. (2) 5 Term Rep. 46 at p. 48.

authorized by the Statute of Merton, and is what cannot be justified except under a custom. But the cases cited on the argument clearly establish that such a right may exist by custom if a sufficiency is left for the commoners. It does not follow that every approvement necessarily interferes with the common of turbary or estovers, for the inclosure may be in a part of the common where neither turf nor wood ever grows; but in the present case it is found that "the making and digging clay has destroyed the heather growing upon the surface of the said common upon the sites of the said workings, the roots of which are used as turves for fuel" (par. 26). Is there then evidence in the case which should lead us to the conclusion, that the lord has the right by the custom of the manor to approve against common of turbary and estovers, as he has by the Statute of Merton to approve against common of pasture? We are of opinion that there is. The direct evidence commences with a lease for ninety-nine years granted in 1751, and it demises a then existing brick-kiln with all "the sheds, erections, and buildings whatsoever with liberty to take in and inclose part of the waste there, not exceeding half an acre, to erect such other buildings thereon as he should think necessary, and to dig and take such brick and tile earth on the said common as he should think necessary for the use of the said kiln." At what date the erections demised as then existing were made, does not appear, but the fact is certain that, at some period anterior to the date of the lease, permanent buildings had been erected. At the expiration of this lease it was renewed from time to time, and meanwhile leases of other parts of the common where clay was found were granted from time to time to brickmakers and others, for the purpose of their erecting thereon brick-kilns and other buildings necessary for brick-making and of digging clay. During the currency of the first-mentioned lease we find from the entries on the court rolls that three presentments were made at different times by the homage of encroachments on the waste. It is true these were by strangers, but the entries shew that the commoners were alive to their interests and noted what was being done "without licence from the lord and tenants." There are besides various entries from 1664 down to 1858 of grants of portions of the waste with the consent of the homage. This it may be said impliedly

1877

LASCELLES v. LORD ONSLOW.

excludes the supposition that the lord could grant out the waste without such consent; but the grants with the consent of the homage were grants of copyhold of parts of the waste to be held by copy of court roll, a proceeding which increases the number of copyholders, and which can only be made by special custom: whereas the leases not being made under this custom conferred no copyhold interest, but took effect as common law demises. The two customs may well stand together; and when we find that no objection was ever made to or notice taken of the granting of such leases until shortly before this action, though the commoners knew of the approvement and were accustomed to buy bricks at the kilns, that in 1858, when Sir Denis Le Marchant, who had common rights, complained of the new kiln which Lawrence had erected within half a mile of his residence, his ground was only that it was a nuisance, and that he threatened an action unless the kiln was removed to some other part of the common, and abandoned all complaint when it was removed to another part, we think that we ought to refer these leases to a legal origin, and to hold that the lord had by custom the very reasonable right to approve, so that he left a sufficiency of turbary and estovers to the commoners.

Mr. Cave, however, relied upon the terms of the grant of 1614, under which the plaintiffs hold, as distinguishing their rights from those of the copyholders, and contended that though the lord might by custom approve as against the latter, he could not do so against the plaintiffs without derogating from his own grant. The terms of the grant are: "And also all and all manner of turbaries, digging and carrying of turves, estovers, and common of estovers, heath, and fern, and also common and common of pasture for all manner of cattle in such sort, nature, quality, and condition as the freeholders and tenants in free socage of the said manor within the parish of Chobham aforesaid have used and enjoyed the same, and also all other the profits, commodities, and advantages whatsoever which in the aforesaid manor of Chobham, and in the township, fields, parish, or hamlet of Chobham aforesaid or any of them in such sort and in so large, ample, and beneficial manner and form in every respect, condition, kind, nature, and quality as the aforesaid George Collyer and George Marten, or either of them, or the assigns of either of them, or any other

person or persons, copyholders, tenants, or occupiers of the bargained premises with the appurtenances, or his or their tenants, or any of them, or any tenant, owner, or occupier of free socage lands, tenements, and hereditaments, with the appurtenances lying in Chobham aforesaid, have heretofore had, used, taken, and enjoyed the same by any right, title, prescription, usage, custom, or lawful means whatsoever." Collyer, it appears by the recital, was the former copyhold tenant of the lands enfranchised by that deed, and Marten, the grantee, was his successor. The argument is, that Marten was here put upon the footing of the freeholders, who, it must be presumed, had rights larger than the copyholders, and which were not subject to the customs of the manor. There is nothing in this case which likens it in any respect to the *Epping Forest Case* (1), to which Mr. Cave alluded: the right here is purely a manorial right; there is nothing in the language of the grant which requires such a construction as that suggested to be put upon it; nor any evidence whatever in favour of the supposition that there was any difference as to the nature and extent of their rights between the two classes of commoners. And the presumption is strongly the other way. To hold that the freeholders' rights of common, which they must have originally received from the lord, were not subordinate to the customs of the manor, would be to suppose that the lord deprived himself of the rights which he had reserved against the copyholders, a supposition which is unreasonable. Besides, the granting of the leases was an assertion of right as much against the interest of the one class of commoners as of the other, and its cogency as evidence of custom is the same against both. This argument, therefore, fails.

One other question remains. We are asked whether the entries in the court rolls and the facts stated with reference to grants of parcels of the waste by the lord, with the consent of the homage, establish a lawful custom to make such grants as against the plaintiffs. This is followed by another more general question upon the same subject, the precise object of which, as distinguished from the former, was not made clear to us.

It was not denied that the entries, commencing in 1664 and

(1) *The Commissioners of Sewers* v. *Glasse*, Law Rep. 7 Ch. 456; Ibid. 19 Eq. 134.

1877

LASCELLES v. LORD ONSLOW.

continuing down to 1858 (with a break of many years unaccounted for, possibly arising from the loss of the court rolls), afford evidence of such a custom against the copyholders; but the contention was, that it was not evidence against the freeholders; or if it was, that such a custom cannot be valid in law as against them, because they only attend at courts baron, and it appears that for some years past the homage has consisted exclusively of copyholders. To the first branch of the argument, the answer just given, as to the effect of the leases as evidence against the freeholders, equally applies to the grants in question. And if the rights of common of the freeholders were originally granted, as we have just said we think they were, subject to the customs of the manor, and the custom was to grant the waste with the consent of the homage at courts consisting only of copyholders, we cannot conceive a reason why such a custom should not be held valid. It is stated, however, that in fact the grants were made at general courts baron, to which the freeholders as well as the copyholders were summoned. Any irregularity in the constitution of the homage at a particular court, though it might possibly invalidate any particular grant (upon which point we must not be understood as intimating an opinion) would not diminish the value of the usage, as evidence of a custom to grant out portions of the waste with the consent of the homage.

For these reasons we answer the second and fourth questions in the negative and the others in the affirmative.

Judgment for the defendants.

Solicitors for plaintiffs: *Reep, Lane, & Co.*
Solicitor for defendants: *Smallpiece.*

COHN *v.* DAVIDSON AND ANOTHER. 1877 *Feb.* 9.

Shipping—Carriage of Merchandise—Warranty of Seaworthiness—Ship seaworthy whilst lying in Port of Loading, but becoming unseaworthy at Time of sailing on Voyage with Cargo on board.

The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo, attaches at the time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy whilst lying in the port of loading, and also at the times of starting from her anchorage for and arriving at the place of loading appointed by the charterer, and of commencing to take on board her cargo.

The defendants were the owners of a vessel, and chartered her for a voyage to D., from the port of S., where she was then lying in a seaworthy condition. Pursuant to the terms of the charterparty, and by the orders of the plaintiff, the vessel proceeded to a wharf situate in the port of S., and there loaded on board a cargo of cement belonging to the plaintiff. At the time when she commenced taking in the cargo she was seaworthy; but by the time of setting sail on her voyage she had from some unknown cause become unseaworthy. The defendants were not guilty of negligence in sending her to sea in the condition in which she then was. Soon after starting from S. she began to leak; but the wind being fair for the voyage to D., the master resolved to keep his course for D., and he was not guilty of any negligence in not returning to S. The vessel did not reach D., but foundered at sea, and the plaintiff's cargo of cement was totally lost:—

Held, that the warranty of seaworthiness implied by law upon entering into the charterparty had been broken, and that the plaintiff was entitled to recover the value of the cargo shipped by him on board the vessel.

THIS was an action to recover the value of a cargo of cement shipped by the plaintiff on board the defendant's vessel named *Iola* to be carried from Sunderland to Dundee. After starting the vessel became leaky, but the wind being fair for the voyage, the captain resolved to go on, and the vessel sank with the cargo on board before reaching her port of destination. The cause of her foundering did not clearly appear. In the course of the summing-up at the trial, Lush, J., asked the jury whether the captain had been guilty of negligence in not going back when the vessel began to leak. The learned judge then proceeded to say that negligence was something more than a mere error of judgment; it was the omission of a duty; and unless there was a duty on the part of the captain to go back, there was no ground for

1877

COHN v. DAVIDSON.

imputing negligence; and that it was not his duty to go back, if he then honestly, although erroneously, believed that he could accomplish the voyage, and if the captain acted honestly the defendants were not liable upon the ground of negligence. The jury answered the questions left to them in favour of the defendants.

The other facts of the case are sufficiently stated in the judgment of the Court.

Notice of motion was given to enter judgment for the plaintiff; and an order nisi for a new trial was obtained, on the ground that the learned judge wrongly directed the jury that the defendants would not be liable in case the master honestly acted to the best of his judgment in not putting back; and on the ground that the learned judge did not sufficiently direct them that the master was bound to consider the interests of the cargo-owners, and that he was bound to act as if he were the owner of the cargo and uninsured.

Jan. 11, 18. *Herschell, Q.C.*, and *C. Crompton*, moved to enter judgment for the plaintiff, and supported the order for a new trial. As to the question of misdirection, they contended that the captain had no right to risk the safety of the cargo, in order that the defendants, as owners of the vessel, might earn freight, but that he was bound to act as if he himself were the owner of the cargo and uninsured. It is against the duty of a captain to go on with the voyage to the injury of the cargo from leakage or any other cause, although the vessel will in all probability reach her port of destination in safety. The captain of the *Iola* was guilty of negligence as regards the cargo; but the jury were told in effect that the only point for them to consider was whether, on discovering the vessel to be leaky, the captain honestly believed that the vessel would reach Dundee in safety. The proper question to be left to the jury was, what a reasonable owner of the goods would have done without reference to the likelihood of the vessel performing the voyage: *Worms* v. *Storey*. (1)

C. Russell, Q.C., opposed the motion to enter judgment for the plaintiff, and shewed cause against the order nisi for a new trial.

(1) 11 Ex. 427; 25 L. J. Ex. 1.

The rest of the argument is sufficiently mentioned in the judgment of the Court.

The following authorities were cited: As to the warranty of seaworthiness implied by law in marine insurance: *Gibson* v. *Small* (1); *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (2); and upon the carriage of goods by sea: *Lyon* v. *Mells* (3); *Tarrabochia* v. *Hickie* (4); as to the liability of carriers of passengers for unknown defects: *Readhead* v. *Midland Ry. Co.* (5); and of persons hiring out buildings with secret defects: *Francis* v. *Cockrell* (6); as to the effect of a description in a charterparty of a vessel's class: *Hurst* v. *Osborne* (7); *Routh* v. *Macmillan* (8); as to the meaning of the word "voyage": *Thompson* v. *Taylor* (9); *Crow* v. *Falk.* (10)

Cur. adv. vult.

Feb. 9. The judgment of the Court (Mellor, Lush, and Field, JJ.), was delivered by

FIELD, J. In this case there were two motions on the part of the plaintiff: one for judgment under Order XL., Rule 2, and the other for a new trial on the ground of misdirection. The action was tried before Lush, J., at the Liverpool winter assizes of 1875. It was brought to recover the sum of 500*l.*, being the value of a cargo of cement shipped by the plaintiff on board the *Iola*, of which the defendants were the owners, and which foundered with the cargo on board in St. Andrew's Bay, on the 21st of May, 1875. The cement was shipped under a charterparty, dated the 14th of May, 1875, and made between the plaintiff and the master of the ship (which was then at the port of Sunderland), and by the terms of it the ship was to "proceed to a good and safe place or places in the river or South Dock as ordered, and there take on board"

(1) 4 H. L. C. 353. 17 Jur 915 1131.
(2) Law Rep. 3 P. C. 234.
(3) 5 East, 428.
(4) 1 H. & N. 183; 26 L. J. (Ex.) 26.
(5) Law Rep. 4 Q. B. 379.
(6) Law Rep. 5 Q. B. 501. See the comments upon *Readhead* v. *Midland Ry. Co.* and *Francis* v. *Cockrell* in *Randall* v. *Newson*, ante, p. 102, at pp. 110, 111, 112.
(7) 18 C. B. 144; 25 L. J. (C.P.) 209.
(8) 2 H. & C. 750; 33 L. J. (Ex.) 38. 10 Jur N S 158
(9) 6 T. R. 478.
(10) 8 Q. B. 467.

1877

COHN v. DAVIDSON.

the cargo in question, and proceed therewith to Dundee to discharge. It appeared at the trial that at the time of the execution of the charterparty, the plaintiff ordered the ship to load at a wharf in the river (which was part of the port of Sunderland), at which wharf cement is often loaded, but at which all vessels of necessity ground on the mud at every low tide. The ship having proceeded to the wharf in obedience to her orders took the cement on board on the 19th and 20th of May, in the afternoon of which latter day (the master having signed a bill of lading of that date in the usual form in pursuance of the ordinary clause in the charterparty requiring him so to do without prejudice to the charter) she was towed out to sea and set sail on her voyage. Her pumps were sounded on starting, and she was found to have made about eighteen inches of water; she was then pumped out, but in about an hour she was found to have made two and a half feet of water, and in consequence of this a consultation was held between the master and the crew as to the proper course to be adopted, and it was agreed that it was better to proceed to her destination, as the wind was fair and the voyage not very long, rather than return to port with a foul wind. She accordingly proceeded on her voyage, the pumps being kept at work, and had reached St. Andrew's Bay within six miles of her place of discharge, when the water having overpowered her pumps, she foundered about a mile and a half from the shore.

Under these circumstances, it was contended at the trial on the part of the plaintiff that the loss of his cement was caused by the ship not being seaworthy, in breach of a warranty on the part of the shipowner that she should be so, which the plaintiff alleged was necessarily to be implied from the charter. It was clear that the ship was not in fact seaworthy at the time she set sail, and that as she was found to be seaworthy when she commenced taking in cargo, she must have received damage in the course of loading. The defendant contended that the implied warranty was thereupon satisfied, and that the whole duty of the shipowner thenceforth was to take due and reasonable care, and that under the circumstances of the case the master had no reasonable means of ascertaining the existence of the defect which rendered her unseaworthy, and was therefore not guilty of any want of care in

setting sail in her then condition. These propositions were denied by the plaintiff, who further set up that, if even they were true, the master was further guilty of negligence in proceeding on his voyage instead of returning to port after he had discovered the unseaworthiness of his ship. Evidence was given at the trial on both sides in support and contradiction of these propositions, and at the close of the evidence, Lush, J., left the following questions to the jury: first, was the *Iola* seaworthy at the time she commenced taking in the cargo? secondly, were the defendants guilty of negligence in sending her to sea in the condition in which she was? thirdly, was the captain guilty of negligence in not returning to port? In answer to these questions, the jury found, first, that she was seaworthy at the time she commenced taking in the cargo; secondly, that the defendants were not guilty of negligence in sending her to sea in the condition in which she was; and, thirdly, that the captain was not guilty of negligence in not returning to port. Upon these findings the learned judge gave the plaintiff leave to move to enter judgment for 500*l.*, if such a warranty as was alleged was to be implied, and if it applied under the circumstances of the case, and the plaintiff's motion for judgment was made under this leave.

Upon the argument before us, Mr. Herschell in support of it relied upon the rule of law laid down by this Division in the case of *Kopitoff* v. *Wilson* (1) (decided since the trial of this cause) that "in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks, to which she must of necessity be exposed in the course of the voyage;" and he contended that although the jury had found that the *Iola* was seaworthy at the time of her proceeding to the wharf in question, her admitted unseaworthiness at the time of her sailing from the wharf was a breach of this warranty, which entitled him to recover. He also contended that a similar warranty was to be implied from the bill

(1) 1 Q. B. D. 377, at p. 380.

1877

COHN v. DAVIDSON.

of lading, which was made on the 20th of May just before she sailed.

Mr. *Russell*, on the part of the defendants, did not dispute the principle laid down in *Kopitoff* v. *Wilson* (1); but relying upon the finding of the jury that the ship was seaworthy for the voyage when she proceeded to the wharf, he said that the warranty attached and was exhausted at that time, the proceeding from the spot in the port of Sunderland, at which she lay at the time of the execution of the charter, to the loading-berth being, he said, an act done under the charter, which formed the commencement of the period at which the warranty attached; and he then argued, in accordance with the English rule of law on that head, that if the warranty was thence once complied with, subsequent unseaworthiness not caused by the negligence of the master did not give the shipper any right of action. He was unable to cite any authority, directly applicable to the case of a contract of carriage, for fixing the application of the warranty within the above rule at this particular stage, the cases he referred to in support of his contention being in truth (as was observed during the argument) cases in which the Court in construing a particular instrument put a particular construction upon the meaning of the word "voyage," as used with regard to the excepted perils under the particular circumstances of the case: *Barker* v. *MacAndrew* (2); *Bruce* v. *Nicolopulo* (3), or decided that upon the construction of the instrument then under discussion the warranty of class was limited to a warranty or representation at the time of the using the words, namely, the execution of the charterparty, and did not continue throughout the voyage. He contended, however, upon principle that the warranty should be held to attach at that period, because the proceeding from where the ship lay at the time of the execution of the charterparty to the loading berth as ordered, was the first act done under the charter, and was equivalent to the commencement of the risk, which, in cases in which an analogous warranty is implied between the underwriter and the assured, is the point of time at which the warranty is to be complied with.

(1) 1 Q. B. D. 377, at p. 380. (2) 18 C. B. (N.S.) 759; 34 L. J. (C.P.) 191.
(3) 11 Ex. 129; 24 L. J. (Ex.) 321.

(2) 6 C. B. (N.S.) 637

1877

COHN v. DAVIDSON.

But we think upon a reference to the principle laid down in those cases and having regard to mercantile convenience, which in construing mercantile matters is a thing always to be regarded, that this contention cannot be supported. Let us first consider what is the nature and object of the warranty of seaworthiness, and under what circumstances it is implied. The merchant has goods which he considers he can dispose of at a profit at a distant port, and having selected his home port from which to dispatch them, he engages or delivers his goods to a ship upon which he may with reasonable safety effect their transport to their place of destination. Having made his contract of carriage, and the law having implied for him the warranty of the shipowner that the ship is fit to meet the ordinary perils of the voyage, the merchant then insures himself against those perils by the ordinary marine policy. Now nothing can be clearer than that upon such a policy the warranty of seaworthiness for the voyage, which he as the assured comes under in like manner by implication to the underwriter, is a warranty that the ship is or shall be seaworthy for the voyage at the time of sailing on it. That is the point at which the risk commences, at which the warranty attaches, and is by the law of England exhausted. No degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading. As, therefore, the merchant in a case like the present would not be entitled to recover against his underwriter by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that, if the warranty to be implied on the part of the shipowner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavour to secure. Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires. A vessel seaworthy for port and even for loading in port, may be, without any breach of warranty, whilst in port unseaworthy for the voyage: *Annen* v. *Woodman* (1); but if she put to sea in that state the warranty is broken. Now the

(1) 3 Taunt. 299.

1877

COHN v. DAVIDSON.

degree of seaworthiness which the merchant requires is seaworthiness for the voyage, and surely the most natural period at which the warranty is to attach is that at which the perils are to be encountered which the ship is to be worthy to meet. The ship is, during her stay in port, and whilst loading, and when she sets sail on her voyage, in the custody and possession and under the control of the master and crew, and it is most reasonable and convenient to impose upon those, who have the best means of knowing, the duty of ascertaining her condition at that critical time when she is about to meet the perils, which it is the object of all parties that she should be prepared to meet.

This being our view of the case, it is not necessary for us to express any opinion upon the subsidiary questions raised by Mr. Herschell; but with reference to the motion made by him for a new trial on the ground of misdirection, in regard to the question of the alleged negligence of the master in not returning to port upon the discovery of the vessel's leaking, we think it right to add that we have read carefully the evidence, the summing-up of the learned judge, and the comments of counsel by which the evidence was pointed and shaped, and we see no reason whatever, looking at the conduct and course of the trial, to doubt but that the learned judge quite sufficiently explained to the jury, and that the jury fully understood, what was the question which they had to decide.

The result, therefore, will be, that under Mr. Herschell's motion we enter judgment for the plaintiff for the sum of 500*l.*, and discharge his order for a new trial.

Judgment for the plaintiff.

Solicitors for plaintiff: *Maples, Teesdale, & Co., for H. B. & C. Wright, Sunderland.*

Solicitors for defendants: *J. W. Hickin, for Ralph Simey, Sunderland.*

[IN THE COURT OF APPEAL.]

1877
April 16.

EX PARTE A. R. SHAW.
IN THE MATTER OF THE DIAMOND ROCK BORING COMPANY, LIMITED.

Company—Rectification of Register—Jurisdiction of Court under s. 35 *of Companies Act* 1862 (25 & 26 *Vict. c.* 89)—*Question of Title—Default in Company.*

In order to give jurisdiction to the Court or judge to order rectification of the register of shareholders in a company, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), it is not necessary that there should be actual default in the company.

It is a matter of discretion whether the Court or judge will exercise the summary jurisdiction; and in a complicated or doubtful case the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made.

S. employed A. to buy for him forty shares in a limited company. A. negotiated for the purchase with P., who was the registered holder of forty shares. S. paid A. the purchase-money for the shares. P. executed a transfer to S., and forwarded it to the secretary of the company, together with the scrip, and the secretary wrote on the transfer, "certificates lodged at company's office," and returned it to P., retaining possession of the scrip. P. forwarded the transfer to A., and he sent it to S., who executed the transfer and returned it to A., in order that he might get S.'s name put upon the list of shareholders, the articles of association requiring the duly executed transfer to be lodged at the chief office of the company before the transferee could be registered. A. acted throughout for both parties, but he did not pay over the price to P., and falsely told him that the purchaser would not complete; upon which P. demanded back the transfer, and A. cut off P.'s signature from the transfer and sent the signature to P., and afterwards absconded. S. demanded to have his name put upon the register as the owner of the forty shares, for which the scrip had been deposited with the company; but the company refused, at the instigation of P. On affidavits disclosing these facts, S. applied, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), for a judge's order to rectify the register by inserting S.'s name as the holder of the forty shares. P. opposed the summons; the company appeared, but offered no opposition. The order having been made as prayed:—

Held, by the Common Pleas Division and Court of Appeal, that, S. having paid P.'s agent for the shares, and the transfer having been duly executed, S. had a legal title to the shares; that the judge had jurisdiction to decide the matter, if he thought right, and that he had exercised a proper judicial discretion in deciding and making the order.

MOTION to rescind or vary an order, of Field, J., under the

1877

EX PARTE SHAW.

Companies Act, 1862, s. 35 (1), directing that the register of the Diamond Rock Boring Company, Limited, should be rectified by inserting the name of A. R. Shaw in lieu of the name of Sir E. Piers as the proprietor of forty shares in that company.

The following were the material facts on the affidavits:—

On the 26th of June, 1876, Shaw, who resided at St. Leonards, Sussex, instructed J. H. Smith, who carried on business at Adelphi House, Strand, London, to purchase for him forty shares in the Diamond Rock Boring Company, Limited, whose registered office was in Victoria Street, Westminster, and upon the 27th of June Shaw paid Smith 183*l.* 2*s.* 6*d.*, the price of the shares, stamp duty, the company's stamp fee, and commission payable to Smith. Smith had meanwhile communicated with Sir E. Piers, for whom he had acted before, and he agreed to sell forty shares in the company of which he was the registered owner. Upon the 28th of June Sir E. Piers executed a transfer to Shaw of the forty

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35: If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of her Majesty's superior Courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the Court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by the Common Law Procedure Act, 1854, shall lie.

1877

EX PARTE SHAW.

shares, and forwarded it together with the scrip to the secretary of the company with the view of the transfer being certified. The secretary thereupon wrote upon the transfer the words "scrip," or "certificates," "lodged at company's office," and returned it to Sir E. Piers, but he retained possession of the scrip. On the 29th of June Sir E. Piers forwarded the transfer to Smith, who sent it to Shaw, and on the 30th of June Shaw returned it executed by him to Smith, in order that Smith might get Shaw's name put upon the register of shareholders. (1) Smith did not pay over the price of the shares to Sir E. Piers, but falsely represented to him that he could not get the amount from the purchaser, and Sir E. Piers told Smith that he must either have the money or the transfer returned to him. Thereupon Smith stated that he could not get the purchaser to complete, and upon the 13th of July he cut out the signature of Sir E. Piers from the transfer and returned the signature to him, Smith retaining the body of the transfer. Smith having disappeared, with the transfer, Shaw, being unable to get possession of the scrip lodged at the company's office, and the secretary having refused, at the instigation of Sir E. Piers, to register Shaw as the owner of the forty shares, obtained the order of Field, J.

1876. Nov. 30. *Willis Bund*, for Sir E. Piers, in support of the motion. First, the Companies Act, 1862, s. 35, confers no jurisdiction to decide a controversy between two persons, each alleging himself to be a member of a company which takes no part in the dispute; it applies only to a controversy between a company on the one side and an alleged member on the other. This is plain from the language of the statute, which does not provide proper machinery for deciding the conflicting claims of alleged members. The authorities are not consistent with each other, and, moreover, are generally inapplicable, for most of them relate to insolvent companies, whereas the Diamond Rock Boring Company is a "going concern," and is for all purposes solvent and prosperous. Upon the one hand, Turner, L.J., in *Stewart's Case* (2), and in *Ward and Henry's Case* (3), and Malins, V.C., in *Ward and*

(1) See note (7) post, p. 466.

(2) Law Rep. 1 Ch. at pp. 585, 586.

(3) Law Rep. 2 Ch. at pp. 436, 437.

12 Jur. N.S. 756.

1877

EX PARTE SHAW.

Garfit's Case (1), and in *Musgrave and Hart's Case* (2), were of opinion that the operation of s. 35, extended to disputes between persons alleging themselves to be shareholders; on the other hand, Lord Cairns, in *Ward and Henry's Case* (3), thought that the section could only be applied to disputes between a company and its members; and Lord Romilly, in *Head's Case and White's Case* (4), appears to have been of the same opinion. It is submitted that this latter view is correct, and ought to be followed; and it was approved of by Jessel, M.R., in *Ex parte Sargent* (5), who pointed out that it could not have been intended to substitute the proceedings under this section for a bill for specific performance, and that in order to entitle himself to an order, the applicant must shew a legal title. Moreover, under the Companies Act, 1867, s. 26 (6) it was for Sir E. Piers, as transferor, to get the transfer registered, and this he had no intention to do without receiving the price.

[CLEASBY, B. The Companies Act, 1867, s. 26, merely empowers the transferor as well as the transferee to get the transfer registered.

FIELD, J. The object of that enactment is to enable a transferor to rid himself of liability in respect of shares which he has parted with.]

Secondly, the provisions of the articles of association as to transfers were not complied with (7), and, therefore, Sir E. Piers remains the owner of the forty shares.

(1) Law Rep. 4 Eq. at p. 196.

(2) Law Rep. 5 Eq. at pp. 203, 204.

(3) Law Rep. 2 Ch. at pp. 441, 442.

(4) Law Rep. 3 Eq. 84.

(5) Law Rep. 17 Eq. at p. 276.

(6) By the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 26: A company shall, on the application of the transferor of any share or interest in the company, enter in its register of members the name of the transferee of such share or interest, in the same manner, and subject to the same conditions, as if the application for such entry were made by the transferee.

(7) The following articles of association were brought before the Court of Appeal upon affidavits:—Article 30: The instrument of transfer of any registered shares shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of such shares until the name of the transferee is entered in the register of transfers in respect thereof. Article 31: A person shall not be registered as the transferee of a share until he shall have left the instrument of transfer, executed according to these presents, at the chief offices of the company.

1877

EX PARTE SHAW.

[FIELD, J. This question was not raised before me at chambers.]

Under the Supreme Court of Judicature Act, 1875, Order LVIII., Rule 2, every appeal is a re-hearing, and therefore any further objection may now be urged.

[FIELD, J. That provision relates only to proceedings before the Court of Appeal, and not to an appeal from a judge at chambers to one of the Divisions of the High Court of Justice.]

Thirdly, the Companies Act, 1862, s. 35, applies only when "the name of any person is, without sufficient cause, entered in or omitted from the register," or when "default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member": *Ex parte Ward.* (1) Now the name of Shaw has not without sufficient cause been omitted from the register, nor has there been any default or delay in entering thereon the fact that Sir E. Piers has ceased to be a member, for the transfer has never been produced at the office of the company. The present case falls at least within the principle, if not within the facts, of *Marino's Case* (2), which was followed in *Musgrave and Hart's Case.* (3)

Jeune, for the company, made no objection to the order of Field, J., and submitted to the direction of the Court.

Kenelm Digby, for Shaw, in support of the order of Field, J. It is not disputed that the Companies Act, 1862, s. 35, allows a discretion as to the exercise of the powers; but in the present case Shaw has a legal title, the transfer having been duly executed by both parties and the money paid; and therefore he is entitled to be registered as holder of the forty shares. It is necessary to consider the course of previous legislation; by the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 25 (4), power was given

(1) Law Rep. 3 Ex. 180.

(2) Law Rep. 2 Ch. 596.

(3) Law Rep. 5 Eq. 193.

(4) By the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 25, If the name of any person is without sufficient cause entered or omitted to be entered in the register of shareholders of any company, such person, or any shareholder of the company, may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's superior Courts of law or equity, and as respects companies registered in Scotland by summary petition to the court of session, apply to such court for an order that the register may be rectified, and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectifica-

1877

EX PARTE SHAW.

to rectify the register of a joint stock company summarily; but no jurisdiction was expressly conferred for trying questions of title; this enactment was considered by Wood, V.C., in *Re British Sugar Refining Co.* (1), to have only a limited operation; but afterwards by the Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), s. 9, power was given in proceedings under the Joint Stock Companies Act, 1856, s. 25, to decide questions of title; and the operation of the two enactments was reviewed in *Ex parte Swan* (2), where it was held that they extended to disputes between alleged members as to the title to shares; and Williams, J., expressed an opinion (3) that if the Joint Stock Companies Act, 1857, s. 9, had been passed at the time when *In re British Sugar Refining Co.* (4) was before the Court, the decision of Wood, V.C., would have been different. The authority of *Ex parte Swan* (5) is decisive in the present case, for although the Joint Stock Companies Act, 1856, s. 25, and the Joint Stock Companies Act, 1857, s. 9, have both been repealed by the Companies Act, 1862, s. 205, and sch. 3, part 1, yet the two sections are substantially re-enacted by s. 35 of the Act of 1862, with the addition of the powers to direct an issue, with an appeal.

[He was then stopped.]

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tion of the register, and may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained; and if the company makes default or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay for the amount of damage he may thereby have sustained.

By the Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), s. 9, The Court may in any proceeding under the twenty-fifth section of the Joint Stock Companies Act, 1856, decide on any question relating to the title of any person who is a party to such proceeding, to have his name entered in or erased from the register, whether such question arises between two or more holders or alleged holders of shares or stock, or between any holders or alleged holders of shares or stock and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register.

The Joint Stock Companies Acts, 1856, 1857, are repealed by the Companies Act, 1862, s. 205, and sch. 3, part 1.

(1) 3 K. & J. 408, at p. 416.

(2) 7 C. B. (N.S.) 400, at pp. 408, 431, 439; 30 L. J. (C.P.) 113, at pp. 114, 117, 121.

(3) 7 C. B. (N.S.) 444; 30 L. J. (C.P.) 123.

(4) 3 K. & J. 408.

(5) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

Willis Bund, in reply.

1877

EX PARTE SHAW.

KELLY, C.B. In my opinion this application ought to be dismissed. Before referring to the Companies Act, 1862, or to the numerous decisions which have been cited during the argument, I wish to state what I understand to be the real facts of the case before us, upon which we have to determine whether the order of my Brother Field should be affirmed.

It is to be remarked, in the first place, that the Diamond Rock Boring Company is not in liquidation, nor even in insolvent circumstances, but is what has been called a "going concern," that is, an existing and, so far as appears before us, a prosperous company. Sir E. Piers was the registered holder of forty shares in this company, and through the agency of a person named Smith contracted to sell them to Shaw. In order to carry out the contract he placed in Smith's hands the transfer of the shares executed by himself; after this had been done, it only remained to deliver to Shaw the transfer for execution by him, and to obtain from him payment of the stipulated price of the shares. Smith transmitted the transfer to Shaw, who, it appears, was resident elsewhere than in London; Shaw duly executed it and returned it to Smith, Shaw had already remitted the price to Smith, who was acting as agent for Sir E. Piers. Shaw, therefore, was for all purposes the legal owner of the shares, and registration alone was wanted to perfect his title. If Shaw had lived in London, and himself had taken the transfer to the office of the company, in the ordinary course of business his name would have been inserted in the register and that of Sir E. Piers would have been removed. But owing to the disappearance of Smith with the transfer, the question has arisen whether Sir E. Piers or Shaw ought to be registered as owner of the shares. Thereupon a summons was taken out, calling upon the company and Sir E. Piers to shew cause why an order should not be made rectifying the register, by omitting the name of Sir E. Piers and inserting that of Shaw. At the hearing, before my Brother Field, the facts were not disputed, and the company submitted to such order as he should think fit to make; he decided that Shaw was entitled to be registered as owner of the forty shares.

1877

EX PARTE SHAW.

Therefore, the question is whether, this being a dispute between two alleged members, my Brother Field had any jurisdiction to make the order appealed against. Consent could not confer jurisdiction in a case like the present, and therefore it is necessary to examine the words of the Companies Act, 1862, s. 35. It is provided that "if the name of any person is, without sufficient cause, entered in or omitted from the register of members," he may have a summary remedy: it might be perhaps doubtful whether the present facts fall within these words if they had stood alone; but when we look at the subsequent provisions, it seems clear that the enactment was intended to embrace a dispute such as that now before us. [The Lord Chief Baron read the latter part of s. 35.] I cannot imagine any language better adapted for conferring a jurisdiction to decide disputes between two alleged members of a company in respect of the title to shares therein. I think, therefore, that the jurisdiction exists.

The decision at which I have arrived is supported by the view of several eminent judges, whose opinions have been cited at the bar. On the other hand, the reasoning of Lord Cairns in *Ward and Henry's Case* (1) seems, at first sight, to be inconsistent with the view I have taken; but I do not think that this is a correct interpretation of the language used by that most learned judge; he merely pointed out the difficulty which a judge or a Court would experience if this enactment were treated as providing a substitute for a bill for specific performance, and he alluded to certain instances in which the remedy afforded by the section might be inadequate. I quite agree that in many cases it may be most inconvenient to decide upon motion or at chambers questions arising between persons alleging themselves to be members; and it seems to me that the power conferred by the section ought not to be put in force in every instance. So far I agree with the view of Lord Cairns; but in a case like the present, where the facts are admitted, and where the legal title of the transferee is established, I think it plain that the jurisdiction ought to be exercised. *Ex parte Swan* (2) is important for our decision. The Joint Stock Companies Act, 1856, s. 25, was certainly of limited operation in

(1) Law Rep. 2 Ch. at pp. 441, 442.
(2) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

comparison with the Companies Act, 1862, s. 35, and it is unnecessary to consider whether the decision in *Re British Sugar Refining Co.* (1) was correct; for the purposes of the present case it may be assumed to have been perfectly right. But the Joint Stock Companies Act, 1857, s. 9, greatly increased the effect of the earlier enactment, for it expressly gave power to decide questions of title arising between two or more alleged holders of shares. The two enactments were considered by the Court of Common Pleas in *Ex parte Swan* (2), and it was held that they conferred the power of deciding a question of the same nature and character as that now before us, and the application being made on behalf of the original owner, the Court directed that the transferees should be made parties to the proceeding. The two enactments considered in *Ex parte Swan* (2) are now repealed by the Companies Act, 1862, s. 205; but, read together, they are substantially the same with the Companies Act, 1862, s. 35. *Ex parte Swan* (2) is, therefore, a decision directly in favour of the conclusion to which I have come; and I do not think that its authority is lessened by anything which may have fallen from the judges in the cases cited on behalf of Sir E. Piers. I therefore hold that the Companies Act, 1862, s. 35, conferred upon my Brother Field jurisdiction to make the order appealed against, and further that upon the facts it was rightly made.

CLEASBY, B. I am of the same opinion. It seems to me, after reading the words of the section, that we cannot say the Court does not possess jurisdiction in such a case, especially when we look at the course of legislation and the concurrent decisions on the subject. The words are "The Court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company."

I quite agree that it never was intended that this section should stand in the place of a suit for specific performance. As the

(1) 3 K. & J. 408; 26 L. J. (Ch.) 369.

(2) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

1877

EX PARTE SHAW.

Master of the Rolls pointed out (1), the words of the section are that the Court may make an order; and if the Court does not think proper on a summary application to decide the question, it refuses to do so. I think it a matter of discretion in certain cases whether the application for the rectification of the register shall be granted or not. I am not prepared to admit that our decision is at variance with the opinion of Lord Cairns in the case referred to (2), because I think that when a real question of title to property arises, the Court ought not, without the consent of the parties, to exercise this summary jurisdiction. Such a question does, in my opinion, arise in this case, as it may well be contended that the authority of Smith was to hand over the deed on payment of the price, and this authority was never exercised, nor the condition performed nor anything equivalent.

That being so, the case comes before us in this form. It does not appear that the learned judge was called upon to exercise his discretion; but the only question was whether he had jurisdiction, because it was contended that the question must be one between the company and its members. I can easily conceive a question arising between a company and its members, as where the articles of association provided that the company should not be bound to register a transfer when calls were unpaid, and they set up that provision in answer to a summary application to the Court. But I see nothing to confine the section strictly to cases arising between the company and members; if it were so, jurisdiction could not be given in a case between members by consent. The sole question here is, whether the jurisdiction existed, and on this I agree with the rest of the Court.

FIELD, J. I am of the same opinion. The facts are as follows:— [The learned judge stated them.] Under these circumstances Shaw took proceedings under the Companies Act, 1862, s. 35, and an application pursuant to that enactment was made to me at chambers. The company, Sir E. Piers, and Shaw appeared before me, each being represented by counsel or solicitor. The facts were not in dispute; I was not requested to direct an issue to be tried,

(1) In *Ex parte Sargent*, Law Rep. 17 Eq. at p. 281.

(2) *Ward and Henry's Case*, Law Rep. 2 Ch. at pp. 441, 442.

1877

EX PARTE SHAW.

but I was asked to decide the question between the parties. Upon the facts before me I came to the conclusion that Sir E. Piers had parted with his interest in the forty shares to Shaw, and that to entitle Shaw to be registered as the holder thereof it was only necessary to produce to the company the transfer, which had been withheld by Smith; for I looked upon Smith as the agent of Sir E. Piers. It was not contended that I ought not, as a matter of discretion, to make the order; but it was argued that Shaw had only an equitable right, and therefore that I could not exercise the power given by the Companies Act, 1862, s. 35. I was, however, of opinion that the legal interest in the shares had passed by the transfer, and made the order prayed for.

Upon the argument before us to-day, it has not been denied, either that I drew correct inferences as to the facts, or that, apart from any question under the articles of association, Shaw was the legal transferee of the shares; but it has been urged that s. 35 only applies where a dispute exists between a company and an alleged shareholder, and does not apply where a dispute exists between two persons, each of whom alleges himself to be a member of a company in respect of the same shares, and therefore that I had no jurisdiction to make the order appealed against. But this objection seems to me completely answered by *Ex parte Swan* (1), decided upon the analogous language of the Joint Stock Companies Act, 1856, s. 25, and the Joint Stock Companies Act, 1857, s. 9, which have been since repealed. But without the aid of authority I should have come to the conclusion that s. 35 confers jurisdiction to decide disputes between persons alleging themselves to be owners of the same shares in a company. The jurisdiction created is very beneficial, and I should be sorry if, in a case like the present, the parties were compelled to litigate the question between them by an action in one of the Divisions of this Court; and when I look at the gradual growth of legislation on the subject, I cannot help coming to the conclusion that the legislature intended the Companies Act, 1862, s. 35, to apply to the facts brought before us. It has been urged that the authority of some eminent judges is against the course which we are about to take; but as to this I agree with what has fallen from my Lord and my

(1) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

1877

EX PARTE SHAW.

Brother Cleasby; and certainly the Master of the Rolls, in *Ex parte Sargent* (1), limits his opinion to this, that it was not intended to substitute the procedure under this enactment for a bill for specific performance. But that view does not touch the present case, because the transfer was executed by both Sir E. Piers and Shaw, and therefore I cannot think that this summary remedy is inapplicable.

A further point has been urged before us, that the present facts do not fall within the mischief which s. 35 was intended to remedy, and that Shaw's name has not, "without sufficient cause," been omitted from the register, and that no "default" has been made in entering on the register the fact of Sir E. Piers having ceased to be a member, because the transfer has never been produced at the office of the company. But I do not think it imperative to produce the transfer, in a case where it has, without doubt, been duly executed. Suppose that a transfer, duly executed by both parties, is lost before it reaches the company's office, and afterwards the transferor dies; is the name of the transferee not to be put upon the register, and is he to lose the shares? Is the failure to produce the transfer a sufficient cause, in every instance, to warrant the directors in refusing to recognise the transferee as a member? I certainly answer this question in the negative. Yet, in order to sustain the objection made before us, the argument for Sir E. Piers must be pushed to this extent. I am clearly of opinion that the order appealed against was right.

Digby and *Jeune* applied for costs.

Willis Bund. The Companies Act, 1862, s. 35, contains no power to give costs as against a shareholder who is brought as a respondent before the Court or judge. The power of granting costs is created only as against the applicant and the company; and Giffard, L.J., in *Ex parte Kintrea* (2), seemed to consider it doubtful whether, under s. 35, costs can be awarded against a person summoned pursuant to its provisions.

KELLY, C.B. Sect. 35 does not relate to the costs of an appeal from a judge at chambers. We think that this application must

(1) Law Rep. 17 Eq. at p. 276. (2) Law Rep. 5 Ch. at p. 101.

be dismissed, with costs to be paid by Sir E. Piers to both Shaw and the company.

CLEASBY, B. The doubt of the Lord Justice in *Ex parte Kintrea* (1) does not extend to the costs of an appeal; it applies only to the costs of an original application.

Motion refused with costs.

Sir E. Piers appealed.

1877. April 11. *Willis Bund*, for Sir E. Piers.

Kenelm Digby, for Shaw.

The arguments and cases cited were the same as in the Court below.

Jeune, for the company, appeared to submit to the order of the Court.

Cur. adv. vult.

April 16. The following judgments were delivered.

LORD COLERIDGE, C.J. (after stating the facts). It appears, therefore, that Smith was acting as agent for Sir E. Piers as well as for Mr. Shaw, and the latter therefore having paid Smith as agent of Piers for the shares, and the transfer having been duly executed by both parties, Shaw had an undoubted legal right to the shares, and was entitled to be registered as the owner of them.

A question might arise, where one person claims to be put upon the register, and another person disputes his right, the company standing neutral, how far there can be said to have been a default in the company,—a question which might be of importance, and has been treated as important in some circumstances, but which I think is not important in this case. It might be otherwise if the company were taking an active part in the matter, but we are told that they desire to take no part, and submit themselves to the judgment of the Court. If it were necessary to determine the question, I should be inclined to think, although the transfer had been mutilated and could not be produced, that the company were in fault. The mere mutilation of the transfer, the purchaser being

(1) Law Rep. 5 Ch. at p. 101.

1877

EX PARTE SHAW.

shewn to have a clear legal title, would not prevent his title from taking effect, and the company would be bound to register the purchaser in the place of the vendor.

But s. 35 of 25 & 26 Vict. c. 89, says, "If the name of any person is, without sufficient cause, omitted from the register of members of any company under this Act, the member aggrieved may by motion in any of the superior Courts of law or equity, or by application to a judge at chambers, apply for an order that the register be rectified, and the Court may, if satisfied of the justice of the case, make an order for the rectification of the register." And then there is an exceedingly important provision at the end of the section, that "the Court may in any proceeding under this section decide on any question relating to the title of any person to have his name entered in the register." And this is still more important, as Mr. Digby has pointed out to us, that this is substantially a re-enactment of two previous sections, namely s. 25 of the Act of 1856, and s. 9 of the Act of 1857. Now, applying the facts to s. 35, we find there is a person whose name, without sufficient cause, has been omitted from the register. He applies to the Court for an order to rectify the register, the Court thinks the justice of the case requires that such an order should be made. It has been argued that because this was a matter in which the company was not in default, and because these are proceedings to which the company is only nominally a party, and not taking any real part in the litigation, the Court had no jurisdiction. The facts seem to bring the case within the words of the first part of the section, without having recourse to the second part, and all conditions necessary to give jurisdiction are fulfilled. But the section goes on to give jurisdiction to the Court to decide in any such proceeding any question of title, which there is here; and the question arises between two members, or alleged members: for whichever way you take it, Shaw is either a member or an alleged member, and Sir E. Piers is also a member or an alleged member; and it is also a question between two members or alleged members and the company: for Shaw demands, and Sir E. Piers resists, the rectification of the register by the company. Finally, the matter is put out of all question by the strength of the last clause: "And generally the Court may in any such proceeding decide any

question that it may be necessary or expedient to decide for the rectification of the register."

If the case stood on the words of the Act alone, those words being the result of a course of legislation, the earlier Act of 1856 not having the later and more general powers which are added and supplied by the subsequent Act of 1857, and the two enactments being re-enacted together by s. 35 of the Act of 1862, I should have thought that the jurisdiction of the Court was clear. But the point is not bare of authority, and there has been a great deal of discussion and several decisions on it. Two views have been entertained, one, which we think the right view, that the words of the Act are not satisfied, unless the Court is held to have jurisdiction, if it thinks fit to decide a question of title, whether the company take an active part in the matter or not, and whether the application arises from a default in the company or not.

On the other side a contrary view is sanctioned, apparently by high authority,—but this sanction is perhaps not more than apparent,—that the section has no application except where the company take an active part and there has been an intentional default on the part of the company, and that in a case where there is anything like a complicated title or disputed equities, the Court not only ought not to interfere as matter of discretion but has no jurisdiction. It will be as well therefore to take a short summary of the cases. Lord Romilly in *Ward and Henry's Case* (1), which was afterwards reversed by the Lords Justices, held that the Court had jurisdiction, and it was the duty of the Court to decide a question of title. In *Stewart's Case* (2), Turner, L.J., seems to have taken the same view, though not quite so strongly, that the Court had jurisdiction to try and decide questions of title between shareholders. And he retained that opinion in *Ward and Henry's Case* (3), but he concurred in reversing the judgment, on the ground that it was not a case in which to exercise the jurisdiction, and as a matter of discretion the Master of the Rolls had gone beyond what was right. Malins, V.C., in *Ward and Garfit's Case* (4), and in *Musgrave and Hart's Case* (5), re-affirmed the same view in the

(1) Law Rep. 2 Eq. 226. (3) Law Rep. 2 Ch. 431.
(2) Law Rep. 1 Ch. 574. (4) Law Rep. 4 Eq. 189.
(5) Law Rep. 5 Eq. 193.

1877

Ex parte Shaw.

most comprehensive terms. These cases were all decided under the Act of 1862; but there is another authority *Ex parte Swan* (1) on the joint effect of the two sections of the former Acts, which is directly and most materially in point, and in which the Court of Common Pleas held most distinctly that the jurisdiction did exist. The case is the more remarkable as an authority, from the fact that in the previous case of *British Sugar Refining Co.* (2), on the first statute of 1856, which did not contain a clause similar to the later clause of s. 35, Wood, V.C., refused to exercise the jurisdiction where there was a disputed title, on the ground that there were no words to give it him. Whether in consequence of this decision or not, at all events, after this decision, the Act of 1857 was passed, which contained the very words the absence of which led the Vice-Chancellor to decide as he did; and in *Ex parte Swan* (1) the Court remarked that if the two statutes had been in force, the decision of the Vice-Chancellor would no doubt have been different, and the same as they were then pronouncing. To the above authorities may be added the high authority of my Brother Lindley in his work on Partnership (3rd ed. vol. 1, p. 176).

On the other hand, there is considerable authority for the contrary view. In *Ward and Henry's Case* (3), Lord Cairns decided expressly on different grounds from those expressed by Lord Justice Turner; and Lord Cairns, no doubt, uses language, which, though perhaps capable of explanation, was not unreasonably pressed upon us as shewing that the jurisdiction did not exist, except when the company were in default and the dispute is between the company and a shareholder; and that any attempt at trying title was not only not to be made as matter of discretion, but was beyond the jurisdiction of the Court. Again, in *Ex parte Sargent* (4), the Master of the Rolls makes an interlocutory remark that he preferred the view taken by Lord Cairns to that taken by Lord Justice Turner, and that he had no power to do what was equivalent to decreeing specific performance. But it is to be observed, that in his judgment the Master of the Rolls uses language very much in favour of the view that the Court had jurisdiction in

(1) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

(2) 3 K. & J. 408; 26 L. J. (Ch.) 369.

(3) Law Rep. 2 Ch. 431.

(4) Law Rep. 17 Eq. at p. 276.

cases of disputed title, and he certainly did make the order to rectify the register on the ground that there was a clear legal title established (1); and, moreover, he made the company pay costs, because the other litigant party, who could not be made to pay costs, was the chairman of the company, and they had improperly acted on his advice and refused to register the transfer. So that the ultimate decision in that case is a strong authority in favour of the jurisdiction.

If, therefore, we were really compelled to choose between the two sets of decisions, I do not hesitate to say I should choose the first series of authorities. Looking at all the words of s. 35, and giving them a reasonable construction, I think that the legislature intended to give the Court jurisdiction to make an order so as to decide questions of title, trusting to the discretion of the Court not to decide in this summary manner any intricate or difficult question of title; but that, if the Court think fit, they have jurisdiction to make the order in all cases.

I myself, however, think it is really not necessary to express dissent from the opinion of Lord Cairns and the Master of the Rolls: for when the language of those very learned judges is duly considered with respect to the cases before them, I do not think it will be found that their opinions differ so materially from ours. In *Ward and Henry's Case* (2) very grave questions arose, which the Court might well refuse to decide, and Lord Justice Turner on that ground reversed the judgment of Lord Romilly, and this was really sufficient for the decision of the case. Lord Cairns, no doubt, goes further, and expresses an opinion that the Court has no jurisdiction when the company is not in default. But I am inclined to think that, if the decision in *Ex parte Swan* (3) had been brought to his notice, and the history of the legislation pointed out to him, he would not have expressed himself in the terms in which he did. Moreover, the expressions which he uses are certainly strong, yet, regard being had to the circumstances of the case, I do not understand him to have held that, when no complicated question of fact or of law or equity was in dispute, the Court could not interfere between the litigant parties; but

(1) Law Rep. 17 Eq. at p. 281.
(2) Law Rep. 2 Ch. 431.
(3) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

1877

Ex parte Shaw.

only when the matter of dispute is the proper subject for more formal proceedings. Again, the dictum of the Master of the Rolls amounts to much the same thing; for his decision was certainly that the Court had jurisdiction, although there was a dispute between two alleged shareholders; which is what we are holding now, that the Court has power to exercise the jurisdiction, if they think proper as a matter of discretion, not that they are bound to exercise it. That this is the true construction of the section is further shewn by the last clause of all. The Court, if a Court of common law (a Court of Equity having the power already), may direct an issue to be tried: that is, instead of deciding the case itself in a summary manner, the Court may have the point decided in a more formal manner before it proceeds to order the rectification of the register.

I am of opinion, therefore, that the Court having jurisdiction, and the discretion having been properly exercised, the judgment ought to be affirmed.

Bramwell, L.J. I am of opinion that the judgment should be affirmed. I entirely agree that on the facts Shaw has made out that he has a good title, except registration, for he paid Piers' agent the price of the shares, and the transfer was duly executed. The question is, whether Shaw's name can be put upon the register by this summary proceeding under s. 35.

If it depended on the company being in default, I should entertain doubts whether there had been any default, for the company are only bound to register on the production of the transfer, or upon an order to register. I believe that a Court of Equity would have compelled the execution of a fresh transfer, but the company would not have been in default until the order had been made. The first question is, does s. 35 apply only when the company are in default, or to all cases? In the first place it may be observed that the section is not very well drawn, as it talks of directing an issue to try questions of law. And, in the next place, we may observe that to try a title in this summary manner is certainly an anomalous proceeding. Another remarkable thing is, that there is no statement of the process by which the different parties concerned are to be got at. Then there is no provision for costs to be

paid by anybody but the applicant or the company. These are some of the difficulties in the way: and we then have the opinion of two eminent judges expressed against the exercise of this jurisdiction; and I think I may be allowed to say that I know that the Master of the Rolls abides by the opinion he expressed. On the other hand, we must look at the considerations tending the other way: but for this proceeding under s. 35, shareholders would be driven to apply for a mandamus, and in that shape the Court would arrive, not very conveniently, at somewhat of the same conclusion. For the process under s. 35 does not differ very much from a rule for a mandamus. And then there is the modern way of thinking that there ought to be a short cut to everything, instead of proceeding by the old forms.

Now it is difficult to say that the section, drawn as it is, does not give jurisdiction in some cases of disputed title, and, if so, it almost follows that it must include all cases. Then, again, Mr. Digby's was a very forcible argument, pointing out the course of previous legislation, and how the two sections of the former Acts were re-enacted in s. 35 of the Act of 1862, and giving in addition the means by which the power of appeal was to be obtained, a power which was found wanting in the former Acts. This goes far to prove that the legislature intended to give, under s. 35, a very wide jurisdiction. Then there is the additional argument that the company itself may apply for the rectification of the register. This would be very strange if there were jurisdiction only in the case of default in the company. Again, there are the words "the Court may decide on any question of title." And that must be where the company is a party, for there can be no proceeding except by making the company a party. Then, looking at the authorities, particularly at the case in the Common Pleas, (1) I must say that, if I have to determine whether s. 35 applies only when there is default in the company, or generally, I feel compelled to say that the section is of general application. One more observation, even if s. 35 only applied where there had been default in the company, surely that objection ought to be taken by the company, if at all. Here the company say they are content to abide by the order of the Court; and it would be strange

(1) *Ex parte Swan*, 7 C. B. (N.S.) 400; 30 L. J. (C. P.) 113.

1877

EX PARTE SHAW.

if, though the applicant be properly entitled to have the register rectified in his favour, the other party could be allowed to say, the Court cannot make the order because the company was not in default.

On all these grounds I think the judgment was right, and ought to be affirmed.

BRETT, L.J. I am also of opinion that the judgment should be affirmed. It seems to me that no case can be within the section which is not within the first part of it; but there may be cases within the first part that are not within the second. The first question, therefore, is whether in the present case there is jurisdiction within the first part of the section. In order to give jurisdiction I do not think it necessary that there should be any default of the company, in the sense of the company having committed any fault. For if that were necessary, then however simple the facts, and however clear the title, the parties might be obliged to proceed by mandamus or suit in equity. In any case where the facts were clear, it was intended to give this summary jurisdiction. It was most expedient, as soon as registration became a necessary part of the title to shares, that the legislature should invent some cheap and summary proceeding to keep the register correct. Jurisdiction to rectify the register is given under the first paragraph of the section whenever any person, whose name is entered in or omitted from the register without sufficient cause, claims that his name ought to be entered or ought to have been omitted, although there has been no default in the company except that the register is not correct: for there is no mention of default in the first paragraph, which is a distinct paragraph by itself and applies to a different state of circumstances to those introduced by the next paragraph, which is in the alternative, and, therefore, distinct from the other,—"or if default is made," &c. Whatever, therefore, may be the meaning of "default," it has no application to the first paragraph; and it is sufficient if the circumstances of the case bring it within the terms of the first paragraph of the section, and jurisdiction is given by reason of Mr. Shaw asserting that the register is incorrect owing to the omission of his name. As my Brother Bramwell has said, the

company may themselves apply to have the register rectified, and the proceeding may be somewhat anomalous; but there may well be cases in which two persons desire to be placed on the register in respect of the same shares, and the company desire to have the question summarily settled; and in winding up a company, it must be remembered that the company are highly interested in having the register of shareholders right.

This case, therefore, appears to me to be within the jurisdiction given by the first part of the section; and if the case be within the first part then these proceedings are taken under the section, and the Court has jurisdiction to proceed and decide the question of title which is involved in the proceedings in which Mr. Shaw and Sir E. Piers are parties. It is a question in which the company is not interested, but it is brought within the second part of the section, as a question of title relating to a person who is a party to the proceeding which arises between two members or alleged members.

It has been said that there is nothing to make necessary the exercise of such a jurisdiction or to shew how it is to be carried out; no doubt the proceeding may be somewhat peculiar; but it is to be observed that several courts are mentioned, not only the superior Courts of law and equity, and the judges at chambers, but the Stannaries Court, and the Scottish Courts, all of which have or had different modes of proceeding, and the section says that the proceeding is to be by petition or in such way as the Courts shall direct. There is, therefore, no practical difficulty, as the Courts have all fallen into the practice, once confined to the Courts of equity, of causing all the necessary parties to be brought before them by making them parties to the proceeding, or by notice of it or otherwise. In all cases the company must be a party, and if the right is disputed the two disputants; in the present case all these, the necessary parties, were before the Court. The facts of the case bring it within the first part of the section, and there being a disputed title it comes properly within the second part, and the jurisdiction to make this order is established.

The other question is whether the jurisdiction was properly exercised. It cannot be right to say, that the Courts have jurisdiction to decide title, yet that they ought always to abstain from

1877

EX PARTE SHAW.

exercising the jurisdiction wherever a question of title or any matter of law arises. No doubt, as a matter of judicial discretion, when there is a real dispute, and the amount depending is large, or if the facts are complicated, or any general principle is involved, the Court, instead of proceeding in this summary manner at once, should direct an issue or some other proceeding. The proceeding by appeal in this court is in the nature of a re-hearing, so that we have power to overrule the discretion of the Court below; but I am of opinion that it was exercised with perfect propriety, and ought not to be disturbed. Any point, however, which could have been made before the judge is open on the re-hearing: and it is objected that no transfer was presented to the company; that objection was not taken before Field, J., and therefore was not open in the Court below (1). But it would be perfectly monstrous, if, after the purchase has been duly completed, and the money paid, and the transfer executed, the right of Mr. Shaw to be registered as the shareholder could be affected by the fact of Sir E. Piers or his agent having destroyed the transfer. If, therefore, this objection had been brought forward, I think it should have been disregarded. Inasmuch as the transfer was executed, and everything done to perfect Mr. Shaw's title, excepting the presentation of the transfer to the company, those, through whose fault it was not presented, cannot take advantage of their own wrong.

I am therefore of opinion that there was jurisdiction to try and decide this dispute relating to title summarily; and that the jurisdiction was properly exercised; and consequently that the judgment ought to be affirmed.

PER CURIAM, the appellant must pay the costs of appeal both to the company and Shaw.

Appeal dismissed.

Solicitors for Shaw: *C. Phelps, Sidgwick, & Biddle.*
Solicitor for Piers: *E. J. Withall.*
Solicitors for company: *Norton, Rose, Norton, & Brewer.*

(1) See note (7) ante, p. 466.

ADNAM *v.* THE EARL OF SANDWICH.

1877
May 8.

Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27, *ss.* 2, 3)—*Fee Farm Rent—Discontinuance of Receipt—Payment of Rent by Person other than the Terre-Tenant.*

14 Ch D 55

Certain lands which were subject to a fee farm rent were, in 1812, conveyed upon a sale by the then owner to the plaintiff's predecessor in title. From 1812 down to 1872 the rent was paid by the vendor and his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to, and so received the rent, were ignorant of the conveyance of the lands to the plaintiff's predecessor in title. In 1872, the successor in title of the vendor refused to continue the payments of rent, and the defendant, as the owner of the rent, thereupon demanded payment of the rent from the plaintiff, and on her refusal to pay it, distrained upon the land for the arrears. The plaintiff thereupon replevied, claiming that the defendant's title to the rent was barred by discontinuance of the receipt of the rent, under 3 & 4 Wm. 4, c. 27, ss. 2, 3, on the ground that the payments of rent since 1812 not being by the terre-tenant, there had been no receipt of the rent within that Act during such period:—

Held, that there was no discontinuance of receipt of the rent; first, because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to the defendant or his predecessors in title; and, secondly, because under the circumstances it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, and the payments of rent from 1812 to 1872 were therefore made on behalf of the plaintiff and her predecessors in title; and that the defendant's title was therefore not barred.

SPECIAL CASE stated in an action of replevin. The facts sufficiently appear from the judgment.

Feb. 2. *H. Matthews, Q.C.* (*Bullen* with him), for the plaintiff. This rent was a freehold rent service; a rent which is an incident of tenure, the liability to which falls upon the land, but not on any one personally: Co. Litt. s. 217, 143 b. At common law debt would not lie for it, but the remedy was by an assize of novel disseisin or mort d'ancestor. It has been decided that since the abolition of real actions, an action of debt will lie where the real action would have lain: *Varley* v. *Leigh* (1); *Thomas* v. *Sylvester*. (2) But no case has decided that any alteration has been

(1) 2 Ex. 446; 17 L. J. (Ex.) 289. (2) Law Rep. 8 Q. B. 368.

1877

ADNAM v. EARL OF SANDWICH.

made in the nature of the rent, or that an action of debt will lie now where the real action would not have lain.

Rent service issues out of the land and denial of the rent was no disseisin of a rent service, as it was of a rent-charge: Co. Litt. s. 237, 160 b. The primary remedy for mere denial of a rent service is by distress, and nothing amounted to a disseisin but something which operated by way of prevention of the distress. The real action did not lie for mere denial. There being no personal obligation on any one to pay, the terre-tenant who conveyed the land to another could not have authority to make any payment of rent for him. Consequently the payments made by the vendor of the land and his successors cannot be considered as payment of the rent. They were mere voluntary payments by a stranger. It follows that the receipt of the rent has been discontinued for more than twenty years, and by 3 & 4 Wm. 4, c. 27, ss. 2, 3, the defendant's title to the rent is barred.

[He also cited *Chinnery* v. *Evans* (1); *De Beauvoir* v. *Owen*. (2)]

J. Brown, Q.C. (*J. O. Griffits, Q.C.*, with him), for the defendant. The defendant and his predecessor in title never discontinued receipt of the rent, nor were dispossessed of it, so that the Statute of Limitations (3 & 4 Wm. 4, c. 27, ss. 2, 3) applied. A man can only be said to be dispossessed if another person gets into possession. This was not the case. Neither was there any discontinuance of the receipt. The defendant and his predecessors continued to receive as rent that which was paid as rent. The Statute of Limitations goes on the presumption that there is some laches on the part of the person entitled in not asserting his right. Here there was nothing of the sort. If the plaintiff's contention is correct, a rent might easily be lost by collusion between the vendors and purchasers of the land subject to it. Secondly, the facts raise the presumption that when the manor was sold there was some arrangement that the vendor should indemnify the purchaser against the rent. Such an arrangement is very common under similar circumstances. The fact of the payment by the vendor and his successors for so many years is not likely to have been by mistake. If this were so, the payments of rent were on behalf of the terre-tenant.

(1) 11 H. L. C. 115. (2) 5 Ex. 166; 16 M. & W. 547.

1857

ALLEN v. EARL OF SANDWICH.

[He cited *Belcham v. Bush* (1); *Toft v. Stephenson* (2); *Woodcock v. Tutterton* (3); *Smith v. Lloyd* (4); *Archbishop of Dublin v. Lord Trimleston.* (5)]

H. Matthews, Q.C., in reply, cited *Rumpus v. Eggington* (6); *Coope v. Cresswell.* (7)

Cur. adv. vult.

May 2. The judgment of the Court (Mellor and Field, JJ.) was delivered by

Lush, J. This is a special case stated by consent. The action is in replevin, and is brought by the plaintiff, as the owner of a moiety of the manor of Sutton Courtney, against the defendant, who is lord of the body of Edward, Earl of Sandwich, upon a distress taken by him for the recovery of two years' arrears of a fee farm rent of 8*l.* 2*s.* 11½*d.*, claimed to be issuing out of the said manor of Sutton Courtney, under letters patent of King Charles I., dated the 6th day of September (A.D. 1628), and which fee farm rent was, by letters patent dated the 3rd day of February, in the fifteenth year of King Charles II., granted to the said Edward, Earl of Sandwich, and his heirs male of his body. The circumstances under which the question submitted to us for decision arises are as follows: In the year 1801 William, Lord Craven, was the lord of the manor (which included the hamlet of Sutton Wick), and was also proprietor of lands within the said parish of Sutton Courtney and the hamlet of Sutton Wick, and by virtue of an inclosure Act (passed in that year) for inclosing the open and common fields within the said parish and hamlet several allotments (amounting altogether to about 630 acres) were made to him. It was provided by the Act that all such allotments should be subject to such and the same charges, payments, rents, and incumbrances as they would have been subject to in case the Act had not been passed, and in consequence the allotments so made to Lord Craven if (as presumably is the case) they were parcel of the wastes of the manor, remained liable to the said fee

(1) 11 C. B. 821; 22 L. J. (C.P.) 25.
(2) 21 L. J. (Ch.) 129.
(3) 12 W. R. 864.
(4) 9 Ex. 562.
(5) 12 Ir. Eq. 251.
(6) 16 Ex. 845.
(7) Law Rep. 2 Ch. 112.

1877

ADNAM v. EARL OF SANDWICH.

farm rent. After the making of the award under this Act, and before the year 1812, Lord Craven sold some of the said allotments to different persons, and apparently to (amongst others) Francis Elderfield, who is mentioned hereafter, and in some way, not explained, some of these allotments have passed to and are now vested in the plaintiff. In the year 1812 Lord Craven by deed conveyed the manor of Sutton Courtney and all the land he had left in the parish and hamlet to Francis Elderfield, through whom the property so conveyed subsequently passed to and is now vested in the plaintiff. The conveyance to Francis Elderfield is dated the 17th of October, 1812, and it was a conveyance for a gross sum of 1030*l.* free from all incumbrances, and contained no reference to the rent in question. Notwithstanding, however, that Lord Craven and his successors in title had thus in and after the year 1812 ceased to hold any of the lands out of which the fee farm rent issued, they continued to pay the said rent to the defendant and his predecessors regularly down to the year 1872, but neither the defendant nor his predecessors had any notice of the conveyance or of the sale of the allotments. In February, 1874, in consequence of a question having arisen between the agents of the defendant and those of the present Earl of Craven as to the right of the latter to deduct the land tax from the amount of the rent, his agent for the first time informed the defendant's agent that Lord Craven had no estate or interest in the manor of Sutton Courtney, which he said had been sold in 1807, and he said that the payment after the sale for very many years by Lord Craven and his predecessor must have been made under a misapprehension as to their liability, and after suggesting the way in which it appeared to have arisen, he informed the defendant's agent that the payments had been made in error, and that reference must be had to the owner of Sutton Courtney (the present plaintiff) for the future payments. After some ineffectual correspondence with the Earl of Craven's advisers the receiver to the defendant applied to the plaintiff, as owner of the said manor, for payment of the two years' arrears of the said rent, amounting to 160*l.* 17*s.* 11*d.*, now in question, and on the plaintiff's declining to pay and denying her liability, a distress was levied on the said manor on the 28th of May, 1875, whereupon the plaintiff replevied

1877

ADNAM v. EARL OF SANDWICH.

14 Ch D 538

and brought the present action, and the question for our decision is whether, under these circumstances, the defendant is entitled to recover the said fee farm rent by distress.

Upon the argument before us the original title of the defendant and his predecessors in title up to the year 1812 to the rent in question was not disputed, but it was said that as by law the only remedy in case of non-payment of a rent in fee was against the terre-tenant before the abolition of real actions by an assize of novel disseisin, and since their abolition by an action of debt (*Thomas* v. *Sylvester* (1)); and as William, Lord Craven, had in 1812 ceased to hold any of the lands out of which the rent originally issued, the subsequent payments by him and his successors to the defendant and his predecessors were not payments of the "rent" in question, as not being made by the terre-tenant or any one authorized by him, and that consequently the remedy of the defendant and his predecessors in title by distress upon the land subject to the rent was barred by ss. 2 and 3 of the Real Property Limitations Act, 3 & 4 Wm. 4, c. 27. But with this contention we cannot concur. The legitimate object of all Statutes of Limitation is no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties; and as the effect of the statute of the 3 & 4 Wm. 4, c. 27, which is now relied upon by the plaintiff, is to divest the estate of the rightful owner, and convey it to a wrongdoer without compensation to the former, to hold that such a transfer takes place, in cases where the rightful owner has been guilty of no neglect or default, would work such an injustice to him as to induce us to resort to any reasonable construction of the statute which should avoid so unjust a result. And we think that the language of the statute is fairly open to such a construction. The 2nd and 3rd sections are in these words:—

Sect. 2: "And be it further enacted that after the 31st day of

(1) Law Rep. 8 Q. B. 368.

1877

ADNAM v. EARL OF SANDWICH.

December, 1833, no person shall make an entry, or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry, or distress, or to bring such action shall have first accrued to some person through whom he claims."

14 Ch D 538

Sect. 3: "And be it further enacted that in the construction of this Act the right to make an entry, or distress, or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say, when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

It appears to us, therefore, that in order to bring a person rightfully entitled within the operation of this section, so as to divest him of his rights there must be a "discontinuance" of the receipt by him, i.e., by not applying for payment, or omitting to enforce his remedies with knowledge that the payment has not been made.

But in the present case the defendant, so far from discontinuing the receipt, has all along since 1812, in the same manner as before, been receiving, as and for the rent, that which the person paying has been paying as and for the rent. The defendant has not omitted to receive the rent—he has not slept upon any right or to his knowledge left any dormant, and he had never the slightest reason for supposing that a prescription was running against him which could deprive him of any.

The circumstance, which it is said deprives the receipt and payment of their validity as a continuance of his rights, viz., the transfer of the tenancy of Lord Craven to the plaintiff's predecessor in title, is one the existence of which the defendant had no reason to suppose and no means of knowing.

It certainly, therefore, under such circumstances, would be an extreme injustice to deprive him of his property without any

compensation, and we think that upon the true construction of the statute he is entitled to our judgment in his favour.

But it appears to us that our judgment may also be rested upon another ground, which bears more closely upon the justice and equity of the case as between him and the present plaintiff.

It was not asserted in the able argument of Mr. Matthews before us on her behalf that it was necessary, in order to make the receipt a continuance of possession so as to prevent the operation of the 3rd section, that the payment should be made by the very hand of the terre-tenant. If made by any person having authority to make it as a payment of the rent to which the land is subject, the receipt would undoubtedly not be discontinued within the meaning of the 3rd section. Thus, if the lands out of which the rent issues are severed in title (as happened in this very case between 1801 and 1812), payment by any one of the terre-tenants would continue the liability of the lands held by any other, and many cases can be conceived which would be attended with a similar result.

Now, in the present case, the circumstances attending the sale by the Lord Craven of 1812 of the manor and lands in Sutton Courtney to the plaintiff's predecessors in title are not brought before us in evidence. All that we have is the instrument of conveyance by which the manor and the residue of the allotments were conveyed, and we have neither the prior agreement between the parties nor any evidence of what the bargain between them in fact was.

That there was a prior agreement and bargain is obviously to be inferred from the facts which are in evidence.

The agent of the present Lord Craven in his letter, which is made part of the case, says that the sale was in 1807, and we know that the conveyance was not until 1812, and that there were prior sales and conveyances to Elderfield of other lands of the then Earl of Craven which were probably subject to this rent.

Now it can hardly be supposed that Lord Craven and his agents were ignorant of the existence of the rent as a charge upon these lands, and it is quite impossible to presume that he or they were guilty of the fraudulent act of concealing from the purchaser the existence of such a charge and selling the lands as free from it.

1877

ADNAM v. EARL OF SANDWICH.

It is reasonable, therefore, to infer that the purchaser (either from the abstract of title or otherwise) was aware of it, and if he was aware of it and has himself never paid it knowing that the land was liable to distress in the event of its non-payment, what other reasonable inference can be drawn but that that, which is very usual in such cases, took place, viz., that the manor was sold free from the rent in question, and at a higher price, therefore, to Lord Craven for it than he otherwise would have got, he on his part undertaking to pay the rent in future, and indemnifying the purchaser and his successors in title against it? Again, it is not to be supposed that the Lord Craven of 1812 would have been so foolish as to continue to pay so considerable a sum as 80*l.* a year, unless he had entered into some bargain with the owner of the land to which it was subject to do so.

In support of so long a receipt as that of sixty years by the defendant it is surely fair and just to resort to a presumption that the payment rested upon some legal foundation, rather than to suppose that it has been gratuitous or by a mistake which, although alleged, is not in any way supported by evidence, and does not appear very probable. For these reasons, therefore, we think that the fair presumption arising from the facts proved is, that the continued payment has been made by Lord Craven and his successors under some arrangement made at the time of the purchase by Elderfield, and to which he was a party, and by which his successors in title are bound, and, therefore, that the defendant's remedy is not barred by the operation of the statute, and we give our judgment for him.

Judgment for the defendant.

Solicitor for plaintiff: *T. Graham.*

Solicitors for defendant: *Peacock & Goddard, for Maule & Barton.*

[IN THE COURT OF APPEAL.]

1877
Feb. 12.

SUGG *v.* SILBER.

Patent—Notice of Objection—Two Inventions—15 & 16 *Vict. c.* 83, *s.* 41.

Under notice of objection by a defendant, to an action for infringing a patent, that the invention was not new, the defendant can at the trial shew that one of two inventions described in the specification is not new, and that the patent is therefore bad.

ACTION for damages and to restrain the infringement of a patent, commenced in October, 1874.

The defendant pleaded eleven pleas, amongst which was, that the plaintiff was not the true inventor of the supposed invention, and that it was not a new manufacture. The defendant's notice and particulars of objections contained the following:

That the plaintiff did not invent the supposed invention in the declaration firstly mentioned, and was not the first and true inventor thereof, nor was the same supposed invention any manner of new manufacture, nor was it new at the date of the said letters patent.

That the same supposed invention was not an invention of improvements in gas-burners, and in the method of constructing and manufacturing the same, and was not such an invention as was or could be the subject-matter of valid letters patent, nor was it the working or making of any manner of manufacture for which letters patent can by law be granted.

That the plaintiff after the date of the said letters patent caused an instrument in writing, purporting to be a specification to be filed in the Great Seal Patent Office, but did not thereby or by any other instrument in writing, and under his hand and seal, filed in the Great Seal Patent Office within the prescribed period, particularly describe and ascertain the nature of the said supposed invention, and in what manner the same was to be performed, and did not by the same specification, or by any other such instrument in writing, as aforesaid, sufficiently ascertain, distinguish, and point out which of the parts and things therein described or mentioned he claimed to have invented, or as being new, or as being comprised in the said letters patent, and which of such parts and things he did not so claim, or were not so comprised, and further parts and things he did not so claim, or were not so comprised, and further that the same specification is vague and ambiguous in its terms, and calculated to mislead.

The patent was for "Improvements in gas-burners, and in the method of constructing and manufacturing the same;" and the specification, after describing the improvements, proceeded to describe the improvements in manufacturing the same, which

1877

SUGG v. SILBER.

consisted chiefly in casting and fixing the principal parts in one operation as therein described.

At the trial before Blackburn, J., one of the points raised for the defendant was, that the specification was bad because it claimed as a separate matter the casting and fixing, which were not new. For the plaintiff it was said that this point was not open to the defendant on his notice of objection, and this point was reserved. On the questions left to the jury whether the specification sufficiently described the invention, and whether there had been an infringement, the jury found for the plaintiff.

The defendant obtained a rule to shew cause why judgment should not be entered for the defendant on the ground of insufficiency of the specification; or why a new trial should not be had, on the ground of misdirection as to the construction of the specification.

The Queen's Bench Division (Blackburn, Mellor, and Field, JJ.) held that the specification was bad. One of the claims was for casting and fixing in a manner which it was admitted was not new, and this, therefore, on the authorities, made the whole patent void. The Court further held that there was a distinct denial by the defendant that the specification was good. It was, therefore, open to the defendant to raise this objection, and the defendant was entitled to judgment on the point reserved.

The plaintiff appealed.

Cave, Q.C., and *Webster*, for the plaintiff. The objections must be definite: *Fisher* v. *Dewick* (1), which was under 5 & 6 Wm. 4, c. 83, s. 5, but the terms of that Act are nearly the same as those of the present Act: 15 & 16 Vict. c. 83, s. 41. The plaintiff has a right to have the objection brought to his notice so that he may know how to meet it: *Heath* v. *Unwin*. (2) [They then proceeded to argue that the specification was good, and that the part which was old was merely a repetition of what had been claimed in the former part, and also argued that the method of casting and fixing was new.]

Aston, Q.C., *Macrory*, and *W. G. Harrison*, for the defendant.

MELLISH, L.J., said that the point as to the method of casting

(1) 4 Bing. N. C. 706. (2) 10 M. & W. 684.

and fixing being new had not been raised before, and was hardly seriously raised now. If there was anything in it, there might be a new trial, but the Court ought not to direct an issue simply for the purpose of trying something which necessarily, as far as the Court could see, must be found in favour of the defendant. The Lord Justice then proceeded:—

Therefore the case must turn upon the point reserved as to the notice of objections. The authorities cited by Mr. Cave were cases where objections had been taken to the notices of objection at the time when they were delivered, and further and better particulars were asked for. In my opinion there is a very large difference between a case where a judge has been applied to and has ordered further particulars in order to state an objection more specifically, and a case where at the trial the plaintiff asserts that the defendant ought to be prevented from availing himself of an objection. It is perfectly obvious that if Mr. Cave was right in saying that the two questions are the same, and that wherever the Court would order further particulars because the objection had not been particularly specified, it would also hold that the party was precluded from raising it at the trial, nobody would be foolish enough to apply to a judge for further particulars. Although the objections did not specifically point out that the invention consisted of several claims, yet the objection, that the invention is not the subject-matter of a patent, is sufficient to open the objection that the whole, or some particular part of it, is not the subject-matter of a patent, and that consequently the patent is bad. Therefore I am of opinion that the notice of objections was sufficient.

[The Lord Justice then expressed his conclusion that the method of casting and fixing was part of what was claimed by the specification, and, that being not new, the specification was bad.]

BAGGALLAY, L.J., and BRETT, J.A., concurred.

Judgment affirmed.

Solicitors for plaintiff: *C. Rogers & Son.*
Solicitors for defendant: *Johnson, Upton, & Co.*

1877
May 18.

[IN THE COURT OF APPEAL.]

BOOTH AND OTHERS *v.* BRISCOE.

Practice—Parties—Joint Action for several Tort—Joint Action for Libel—Order XVI., Rule 1.

Under Order XVI., Rule 1, an action of libel may be brought by two or more persons jointly, although they are not in partnership or otherwise jointly interested; and in such a joint action a single verdict of 40*s.* having been returned for the plaintiffs, the Court of Appeal refused, on the motion of the defendant, to disturb the verdict.

THE plaintiffs were the eight trustees of certain charities at Outwell, near Wisbeach, and brought an action against the Rev. J. G. Briscoe, rector of Outwell, for a libel contained in a letter, written and published by him in the *Wisbeach Chronicle*, commenting on the improper management of the charities by "the trustees." The action was tried at Westminster on the 12th of April, 1877, before Field, J., when a verdict was given for the plaintiffs with 40*s.* damages. The defendant applied to the Queen's Bench Division to grant a new trial, on the ground that the verdict was against the weight of evidence; or to enter judgment for the defendant, on the ground that the occasion on which the libel was published was privileged.

THE COURT (Mellor and Lush, JJ.) refused the application on both points.

The defendant appealed.

April 26. *Powell, Q.C.*, for the defendant. The rule as to a new trial not being granted where the damages are under 20*l.* does not apply to actions for libel, and the verdict was against the evidence.

[BRAMWELL, L.J. It is clear that an action for a libel by eight plaintiffs could not have been formerly brought, and can it have been intended by Order XVI. that such an action should be allowed?]

Secondly, the defendant in his position had a right to comment on the management of the charities, and the comments are fair.

(Wilde WN (1875) 348

THE COURT expressed their opinion that no new trial could be granted, nor ought judgment to be entered for the defendant on the grounds on which the application was made; but doubted as to an action for libel by eight plaintiffs.

Cur. adv. vult.

May 18. BRAMWELL, L.J., delivered the judgment of the Court (Lord Coleridge, C.J., and Bramwell and Brett, L.JJ.) In this case we think that the appeal should not be allowed. The principal questions were decided upon the hearing, and it was in reference to a difficulty made by myself that we further considered the case. We say generally that we are satisfied that there was no misdirection. Then as to a new trial, the verdict being for less than 40*s.*, we consider the rule to be still in existence, that where the damages are under 20*l.* a new trial ought not to be granted on the ground that the verdict was against the evidence. The only remaining matter was a doubt I had suggested, whether these eight plaintiffs, if they had any cause of action, had not eight separate causes of action, and whether they could be joined as plaintiffs. I am still of opinion they had eight causes of action, and that they might have brought eight actions; and the question is whether under the Judicature Act any difference has been made so that they can bring one action. Where a tort has been done, the tort is a separate tort to each man who complains. If indeed there were a joint tort, for instance, slander of several persons in partnership, the persons injured would have joined and maintained the action, but could have maintained the action for the joint damage only. Here there is no joint damage. Each man's character, if there is a libel, has been separately libelled. There is no doubt, therefore, that prior to the Judicature Act this proceeding would have been erroneous, but it seems to us that under Order XVI., Rule 1, these plaintiffs may well join as plaintiffs: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." Now it seems to me that that word "severally" must comprehend the present case. I think therefore that they may very well join; and if several actions had

1877

BOOTH v. BRISCOE.

been brought, a consolidation might, if there was any convenience in it, have been ordered by an application under the other rules. But although they might all join, I think, as their damages are several, their damages ought to have been severally assessed, instead of which, 40*s.* has been given to the whole of them. But who is to complain of that? I do not think that the defendant will suffer by it, because the probabilities are that if the damages had been severally assessed there would have been eight times 40*s.* damages given. At all events, he does not shew that he is injured by it; and if the plaintiffs have no objection to take the 40*s.* and divide it amongst themselves, it seems to me that the defendant has no right to complain. As far, therefore, as this is concerned, I see no difficulty in saying that this verdict and judgment should stand. (1)

Judgment affirmed.

Solicitor: *S. W. Johnson.*

June 7.

STREET AND EDMUNDS *v.* GOVER.
GOVER *v.* STREET, EDMUNDS, AND POTTS.
(BY COUNTER-CLAIM).

Practice—Pleading—Counter-claim, who entitled to—Person named in Defence as Party to a Counter-claim—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Judicature Act*, 1875, *Order XXII., Rule* 8.

A person, named in a defence as a party to a counter-claim thereby made, cannot counter-claim against the defendant.

THIS was an application to rescind an order of the master striking out a counter-claim by Potts against Gover. The statement of claim in the original action was for money due to Street, whose trustee in bankruptcy the other plaintiff Edmunds was, upon a building contract. Gover the defendant pleaded by way

(1) In *Garnet* v. *Bradley* (2 Ex. D. 349) the Court of Appeal, overruling *Parson* v. *Tinling* (2 C. P. D. 119), decided that Order LV. had left all the statutes as to costs untouched, and that the decision, whether a plaintiff was entitled to costs or not, would, in the absence of any special order of the Court or judge, depend on the amount of the verdict.

1877

STREET v. GOVER.

of counter-claim, bringing in Potts under Order XXII., Rules 5 and 6. The nature of the counter-claim so pleaded was as follows: The defendant Gover alleged that the building contract was made between himself and Street and Potts jointly, and that by reason of the default and delay of Street and Potts in carrying out the works, the subject of the contract, there was a cross-claim due from them to Gover for penalties and damages under the contract. Potts sought to counter-claim against Gover, his counter-claim alleging that there was no contract between Gover and himself and Street jointly, but that his contract with Gover was a separate contract for the execution of works distinct from those which Street had contracted for, and setting up claims under that contract against Gover. The master had struck out this counter-claim, whereupon Potts had appealed to Field, J., at chambers, who had referred the matter to the Court.

Dodd, for Potts, moved to rescind the master's order. The Judicature Act, 1873, s. 24, sub-s. 3, clearly gives the right of counter-claiming to a party brought in as Potts has been. Such a person is to have "the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant." The intention of the Act is to settle in one proceeding all the rights arising out of the same transaction. The right of counter-claiming is a right in respect of defence against a claim, the meaning being to put unliquidated counter-claims on the same footing as the old set-off. It is a very narrow construction of Order XXII., Rule 8, to construe "reply" as excluding a counter-claim. [He cited *Furness* v. *Booth*. (1)]

Lumley Smith, for the defendant Gover. If the contention on behalf of Potts is correct, the utmost complexity would be produced. Moreover, there is nothing to confine a counter-claim so made to matters more or less connected with the original action, as is the case with the matters in the present counter-claim. The 8th Rule of Order XXII., which provides for the pleadings of a person brought in as defendant to the counter-claim, seems to contemplate that such a person shall be confined to defending himself

(1) 4 Ch. D. 586.

1877

STREET v. GOVER.

against the counter-claim in the proper sense of the word, for it only speaks of a "reply," not of a counter-claim.

MELLOR, J. I am of opinion that the decision of the master was correct. It cannot have been intended that a counter-claim should be allowed in circumstances such as exist here. It would render the action untriable.

LUSH, J. I have felt some difficulty in this case, but I think we must construe this legislation with some reference to the practicability of trying an action. I think we must construe Order XXII., Rule 8, as being an exposition of what the legislature meant by the Judicature Act, 1873, s. 24, sub-s. 3, and as limiting the right of the third person who has been brought in to defending himself against the counter-claim. The last sentence of sub-s. 3 is, in my opinion, quite capable of this exposition. The words are "with the same rights in respect of his defence against such claim as if he had been sued in the ordinary way by such defendant." The 8th Rule of Order XXII. says that a person so brought in may deliver a reply, but it says nothing about a counter-claim. The introduction of a counter-claim would produce such complexity as to render an action untriable. For these reasons I think the rule must be refused.

Rule refused.

Solicitors for Potts: *Oehme & Summerhays.*
Solicitors for Gover: *Austin, De Gex, & Harding.*

LOHRE *v.* AITCHISON.

1877
June 25.

Marine Insurance—Partial Loss—Cost of Repairs—Allowance of one third New for Old—Suing and Labouring Clause—Salvage Expenses.

The defendant insured the plaintiff for 1200*l.* upon a ship valued at 2600*l.* The ship encountering rough weather suffered sea damage, and incurred salvage expenses to the amount of 519*l.* She was repaired, and the result of the repairs, the ship being an old one, was to make her more valuable when repaired than she was at the time of the insurance. The defendant, in an action on the policy to recover for a partial loss, contended that he could not be liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of salvage and general average expenses, and that the depreciation in value of the ship by sea damage, not the cost of the repairs, was the measure of the partial loss:—

Held, that the cost of repair, making the usual deduction of one third new for old, was the measure of the loss if the shipowner elected to repair, and consequently that the assured was entitled to recover such cost of repair up to the amount insured for, even although the loss so estimated might amount to more than a total loss with benefit of salvage:—

But *held*, that the assured could not recover under the suing and labouring clause in respect of a proportion of the salvage expenses over and above the 1200*l.*, because, the damage done to the ship being so great as already to exhaust the policy and the assured not having abandoned, the salvage expenses did not enure to the benefit of the underwriter.

Action upon a policy of marine insurance upon the ship *Crimea*.

The declaration contained a count on the policy alleging a total loss of the ship by the perils insured against, and further that the plaintiff necessarily incurred certain charges and expenses under the suing and labouring clauses, and common money counts.

Plea, payment into court of 1080*l.*, being the defendant's proportion of a total sum of 2340*l.*

Replication denying that such payment into court was sufficient.

By consent of the parties, a special case was stated, of which the facts so far as material, were as follows:

The policy was for 1200*l.* upon the ship valued at 2600*l.*, against the usual sea risks, on an out and home voyage from the Clyde to Quebec or St. John's, and thence to the United Kingdom; and it contained the usual suing and labouring clause. The balance of 2600*l.*, the agreed value of the ship, was covered by other policies.

1877

LOHRE v. AITCHISON.

The ship on her homeward voyage encountered very heavy weather, and was ultimately while in great danger of being lost, brought into Queenstown by the steamship *Texas*.

The owners of the *Texas* demanded remuneration for her services, and arrested the ship and cargo in a salvage suit in the Irish Admiralty Court, which Court ultimately awarded 800*l*. for the services of the *Texas*, against ship and cargo owners.

The ship was surveyed and examined at Queenstown by competent surveyors, who reported as to the necessary repairs. The plaintiff thereupon applied for estimates of the expense of doing such repairs, and the lowest estimate obtained was from the Cork Harbour Docks and Warehouse Company, whose estimate was 2982*l*., exclusive of sails, rigging or equipments, and certain other costs mentioned in the survey.

The plaintiff accepted the estimate, and a formal contract for the work specified therein at the sum of 2982*l*. was signed between the plaintiff and the said company. The plaintiff at the same time obtained estimates for the necessary rigging, &c., amounting to 988*l*. 14*s*. 5*d*. The ship was accordingly repaired under the said contract. Besides the work included in the contract for 2982*l*., the rigging, sails, and equipment were made good as specified in the survey, and other work therein described was done to her. She was at the same time metalled (not having been metalled before the loss), and in addition, certain other work was done to her, included neither in the survey nor in the contract for 2982*l*., the cost of which amounted to about 65*l*. With the exception of this 65*l*. and the metalling above mentioned, all the work done to the ship was specified in the survey or included in the contract for 2982*l*. Of the work above described, it was admitted that the metalling, the cost of which was about 695*l*. 17*s*. 10*d*., and certain other matters the cost of which amounted to about 500*l*., was new work and not properly repairs, and no claim was made in respect of them.

All the works with the exception of the last mentioned sums, were undertaken for the purpose of making the ship staunch and strong and seaworthy, which she had ceased to be by reason of the sea damage she had sustained, and they were reasonably necessary for the purpose. The effect of the works was to make the ship a

very much stronger and better ship and of very much greater value than she had been before she sustained damage. Divers general average charges were incurred, to which the ship was liable to contribute and which were covered by the policy, and divers particular average charges were incurred other than those for repairs which were covered by the policy.

The ship, at the time of the loss, was fifteen or sixteen years old. Her value in her undamaged condition, before the loss, was 3000*l.* Her value, as she lay in her damaged condition, was 998*l.* The amount of the salvage and general average expenses borne by the ship was 519*l.* 0*s.* 1*d.* The amount expended on the ship (exclusive of the 695*l.* 17*s.* 10*d.* for metalling and of the 500*l.* for work admitted to be new work), was 4414*l.* 18*s.* 11*d.* The last mentioned amount (after deducting therefrom one third new for old in all matters to which such deduction is properly applicable) added to the amount of the other particular average charges on ship, amounted to 3178*l.* 11*s.* 7*d.* The value of the ship after repairs was 7000*l.*

The plaintiff contended that upon the facts above stated he was entitled to recover 1707*l.*, a sum arrived at in the following manner: the said sum of 515*l.* 0*s.* 1*d.* being the ship's proportion of salvage and general average charges, and the said sum of 3178*l.* 11*s.* 7*d.*, added together, made the aggregate sum of 3697*l.* 11*s.* 8*d.*; and 1707*l.* bears the same proportion to 3697*l.* 11*s.* 8*d.* which 1200*l.*, the amount insured, does to 2600*l.*, the valuation in the policy. If this contention was right, the amount paid into court was deficient.

The defendant contended that the above repairs could not be allowed in particular average or as a measure of the depreciation of the vessel, and that in any event the underwriters were not liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of all salvage and general average charges.

The Court were to draw inferences of fact.

The question for the Court was whether the plaintiff's contention or the defendant's was correct, or upon what principle the defendant's liability was to be estimated; and it was agreed that after the decision of the Court the matter should be submitted to

1877

LOHRE v. AITCHISON.

an arbitrator, to settle the figures upon the footing laid down by the Court.

Cohen, Q.C. (*Hollams* with him), for the plaintiff. The contract of insurance is a contract of indemnity. The assured is not bound to abandon but is entitled to repair the ship, and if he does repair, the expense of repairing is the measure of the loss, subject to the customary deduction of one third new for old; consequently the expense of such repairs may be recovered up to the amount insured. It must be admitted that the claim of the plaintiff for 1707*l.* is excessive, but it is not disputed by the defendant that the plaintiff is entitled to recover in respect of the salvage expenses amounting to 519*l.* 0*s.* 1*d.*, and it is contended that he is entitled to recover in respect of an average loss up to the amount insured, which average loss is to be calculated as before stated, viz. by the amount expended in repairs, subject to the deduction of one third new for old. The plaintiff will therefore be entitled to recover such a proportion of 3119*l.*, that is the amount of the salvage expenses, 519*l.*, added to 2600*l.*, the total value insured on, as twelve bears to twenty-six. The amount paid into court is therefore insufficient, the plaintiff being entitled to recover 1400*l.* odd. It is a fallacy to suppose that the plaintiff cannot recover in respect of a partial loss more than the amount of a total loss with benefit of salvage. The case of a ship differs from that of cargo insured. It has never been suggested before that, for the purpose of estimating a partial loss on ship, you should take the value of the ship and take the proportion by which the value of the ship as depreciated after the loss is less than such estimated value. The ship is not to be treated merely as a saleable chattel as goods are. It is erroneous to suppose that the contract is only to put the assured in the same position pecuniarily as before the loss. The owner of the ship does not want the ship as a speculation for the purposes of sale, but as a freight earning machine. The fact that the owner will be better off than if there had been a total loss is an accident, arising from the operation of the well established rule that deducts one third new for old. When the ship is old, this rule operates in favour of the assured, but when it is new it operates in favour of the underwriter. The rule is an arbitrary one, but it is perfectly

1877

LOHRE v. AITCHISON.

well established as working well on the average, and the fact that in this particular case it gives the plaintiff an advantage cannot alter the general principle by which the amount of the repairs is the measure of the loss. [He cited *Kidston* v. *Empire Insurance Company* (1); *Stewart* v. *Steele.* (2)]

Benjamin, Q.C. (*Crofton* with him), for the defendant. It is an error of principle to say that the cost of repair is the measure of the loss. It is generally the measure, because in most cases the amount of the cost of repair and the amount of loss differ very little. The depreciation in value of the ship is the measure of the loss. The net value of the ship, after deducting the salvage expenses, was 998*l.* That deducted from 2600*l.*, the agreed value, leaves 2121*l.* The plaintiff here gets for salvage what is worth 479*l.*, that being the net value of the hull: this added to 2340*l.*, 90 per cent. of 2600*l.*, of which sum the sum paid into court is the defendant's proportion, amounts to 2819*l.* on a partial loss, when a total loss would have been 2600*l.*, and yet the plaintiff says that he has not recovered enough. It is contended that it is impossible that the underwriters on a single peril can have to pay more in respect of a partial loss than in respect of a total loss, and that consequently the plaintiff is far overpaid already.

The fallacy in the plaintiff's mode of calculation is that he takes the vessel at her value after she has been made a new vessel; in other words, he wants to build a new vessel at the underwriters' expense. The shipowner is no doubt not bound to abandon, but if he does not he cannot throw a greater loss on the underwriters than a total loss would be. [He cited *Lidgett* v. *Secretan* (3); *Knight* v. *Faith* (4); 2 Phillips on Insurance, paragraph 1743; *North of England, &c., Insurance Co.* v. *Armstrong.* (5)]

Cohen, Q.C., in reply, cited *Peele* v. *Merchants' Insurance Co.* (6)

Cur adv. vult.

June 25. The judgment of the Court (Mellor and Lush, JJ.), was delivered by

LUSH, J. This case raises the following questions for our

(1) Law Rep. 1 C. P. 535; 2 C. P. 357.

(2) 5 Scott, N. R. 927.

(3) Law Rep. 6 C. P. 616, 626.

(4) 15 Q. B. 649; 19 L. J. (Q.B.) 509.

(5) Law Rep. 5 Q. B. 244.

(6) 3 Mason, 27.

1877

LOHRE v. AITCHISON.

decision: First, whether the liability of the underwriters on a ship which has been repaired by the assured is to be measured by the cost of the repairs or by the depreciation of the vessel as a saleable chattel. Secondly, whether, in the case of a partial loss, the assurer can be liable for more than a total loss with benefit of salvage.

The facts may be briefly stated. The defendant insured for 1200*l.* upon a ship valued in the policy at 2600*l.* The works necessary to repair the sea damage cost, after the usual allowance of one third new for old, together with certain particular average charges covered by the policy, the sum of 3178*l.* 11*s.* 7*d.* In addition to this expenditure the plaintiff had to pay 519*l.* for salvage services and general average expenses. The value of the ship at the commencement of the risk was 3000*l.*, and her value on her return to port in her damaged state 998*l.* Being an old ship, the effect of the extensive repairs done was to make her a very much stronger and better ship than she was before the damage, and after having been metalled (which she was not before) at a cost of 695*l.* 17*s.* 10*d.*, and had new works done at a cost of about 500*l.* (neither of which sums is, of course, charged against the underwriter), she was worth 7000*l.*

If the loss is to be estimated by the depreciation of the ship as a saleable chattel, the defendant has paid more than sufficient into court. For, deducting from the value of the hull, the cost of bringing her to port, and supposing that to be 519*l.*, the balance 479*l.* represents the salvage; and deducting that sum from the 3000*l.*, her value when she sailed, the depreciation by sea damage would be 2521*l.*, or about 84 per cent., which, upon 1200*l.*, would be 1008*l.* This is the principle on which damage to cargo is estimated, and this the defendant contends is all that he is liable to pay. And what lends additional force to the defendant's contention is, that even with this percentage the plaintiff will be more than indemnified. He has paid altogether, in order to get the ship up to her present value of 7000*l.*, sums for repairs amounting to 4414*l.* 18*s.* 11*d.*; for metalling 695*l.* 17*s.* 10*d.*; for other new work 500*l.*, and for salvage and average charges 519*l.*; making together 6129*l.* If he receives 84 per cent. on 2600*l.* he will realise 2184*l.*, which, deducted from 6129*l.*, leaves 3945*l.* as the

total outlay to be borne by him; adding to this the original value of the ship, 3000*l.*, the aggregate falls short of what the ship is now worth by 55*l.* And if he recovers from the underwriters the full amount of the insurance, he will be nearly, if not more, than 500*l.* in pocket. This is certainly a startling result, and one which gives great moral force to the defendant's argument. But notwithstanding it happens in this particular case that the plaintiff will be not merely indemnified, but will be a considerable gainer, the contract cannot receive a different construction from that which it would have received if the result had been loss instead of gain to him. For the indemnity intended by the contract of insurance is the making good to the assured the loss he sustains by sea damage during the voyage insured. Whether the assured will ultimately be a gainer or a loser by the transaction is a matter beyond the scope of the contract, and one with which the underwriter has no concern. The circumstance, that in this case the owner happens to be in the result in a better position than he would have been if the accident had not happened, cannot therefore be taken into account. We must consequently return to the only question we have to consider, viz., what is the measure of damage which the underwriter on a ship engages to pay in the case of a partial loss. Is the ship to be viewed for the purpose of this computation in its damaged or in its repaired condition? If ships were kept merely for sale, it might reasonably be contended that the same principle should be applied which is applied to damaged goods. But a ship is intended to be used for profit. The owner is in many contingencies bound to repair. He has always the right to repair, and it is in the contemplation of both parties that if damage happens the ship will be repaired if it is worth the cost. If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for. But if he elects to repair, the loss is ascertained by the cost of the repairs, less a proper deduction on account of having new timber for old. Nothing short of this would be an indemnity. The cases cited by Mr. Benjamin are no authority for the position that when the repairs have been done,

1 Q.B.D. 502

1877

LOHRE
v.
AITCHISON.

their cost, with the qualification just mentioned, is not the proper measure of damage.

The anomaly in this case is really caused by the arbitrary rule which has been established of estimating the benefit which the owner receives from having new timbers in the place of old at one third of their cost. If it were allowable to enter into the inquiry what in the present case should be the proportion, a much larger allowance—perhaps two thirds—would be a nearer approximation to the reality, and that would have reduced the claim on the underwriter to the dimensions of an ordinary partial loss. But this, we think, cannot be done. To prevent the disputes and difficulties which such an inquiry in each particular case would cause, an average rate of allowance has been adopted, and the usage has been so long established and so uniformly applied, that it has become impliedly incorporated into the contract: see *Da Costa* v. *Newnham* (1); *Poingdestre* v. *Royal Exchange Assurance Company* (2); *Fenwick* v. *Robinson.* (3) For repairs to ships which in the language of marine insurance are termed "new" ships, that is, ships on their first voyage, or which are less than a year old (for it does not seem to be settled what the precise test of novelty is), no allowance is made, for they cannot be the better for the repairs. But as to all other ships the rule applies, whatever may be their age or the state of their timbers. If the ship is like the *Crimea*, an old ship, the rule operates greatly in favour of the owner; if the ship is a sound, newly built ship, the underwriter has a great advantage. It is clearly for the benefit of all parties that some fixed rule of allowance should be established, and as this has prevailed so long it may be presumed that on the whole, and in the long run, justice is done. At all events, being so established and being by implication part of the contract, it cannot be varied to meet the equities of a particular case. The contention that underwriters are not liable for more than a total loss with benefit of salvage, is founded on a misconception of the contract, which is, as before observed, a contract of indemnity. When the assured abandons and claims for a total loss, the underwriter is

(1) 2 T. R. 407. (2) R. & M. 378.
(3) 3 C. & P. 323, at p. 324.

entitled to salvage. But the owner is not bound to abandon. This Mr. Benjamin admitted. He may always repair if he pleases, and claim for a partial loss, and when he does so the salvage belongs to him. The contract is not to pay 1200*l.* in the event of a total loss only, and a smaller sum if the loss is only a partial one. If this had been the intention it should have been so expressed. What the underwriter engages to pay is any loss which the assured may incur from the perils assured against, not exceeding the specified amount.

The claim for a proportion of the salvage expenses over and above the 1200*l.* is one which we think ought not to be allowed. It is true the policy contains the usual suing and labouring clause, which is a separate contract, and by which the underwriter engages to contribute towards the expenses of "labour and travel for, in, or about the defence, safeguard, and recovery of the said ship." But the salvage services were not employed with any view to the benefit of the underwriter, nor did they enure to his benefit. The damage done was so great as already to exhaust the policy, and the underwriter could gain nothing from the effort used to save the ship from sinking unless the plaintiff abandoned. If he had abandoned, the defendant would have had the benefit of the services in having the hull, which was preserved by them, and then he must have paid for them. But as the assured refused to abandon, he elected to appropriate those services to his own benefit, and having done so, he cannot charge them against the underwriter.

Judgment accordingly.

Solicitors for plaintiff: *Hollams & Coward.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

1877
June 9.

[CROWN CASES RESERVED.]

THE QUEEN *v.* COOPER.

False Pretences—Evidence of Pretences.

C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he then was in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter written by him to the prosecutor:—"Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, &c.

"P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on:"—

Held, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury, whether the writer intended the prosecutor to put that construction upon them.

CASE stated by the chairman of the quarter sessions for the West Riding of Yorkshire, holden at Wakefield.

William Cooper was, on the 2nd day of April, 1877, convicted of having obtained 8 tons 15 cwt. 2 qrs. of potatoes, the property of one John Gellatly, by false pretences.

The indictment charged that William Cooper did falsely pretend to one John Gellatly that he the said William Cooper then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business, and that he then was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, by means of which said false pretences the said William Cooper did then unlawfully obtain from the said John Gellatly eight tons fifteen hundredweights and two quarters of potatoes of the goods and chattels of the said John Gellatly with intent thereby then to defraud. The indictment then negatived the pretences.

In support of the prosecution the following letter, addressed to John Gellatly, was given in evidence:—

"Sheffield, Jan. 17th, 1876.

"Dear Sir,—Please send me one truck of regents and one

truck of rocks as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice. Yours truly, "William Cooper.

"P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

It was amply proved in evidence that the prisoner when he ordered the regents and rocks, which are kinds of potatoes, had no intention of paying for them; that he held from time to time a stall in the public market for which he paid by the day, and also dealt as a huckster, carrying about fruit in a small cart drawn by a donkey; and several of the witnesses, though very well acquainted with him and his trade, were ignorant of his dealing in potatoes.

The potatoes were sold by the prisoner in part at the railway station, at a less cost than they would have stood to him, and as to the other part, when on receipt of a telegram from the seller inquiries were made by the railway people, the prisoner, who was at the station filling his sacks, left the potatoes and his sacks, and could not be heard of for several weeks though the police were in active search of him.

It was contended by the prosecution that the letter or order of the prisoner amounted to a representation that he was a person trading in a considerable way, and that the order given was on a scale consistent with his ordinary transactions; whereas his ordinary dealings were on a very small scale, to which the large order for potatoes was disproportionate, and that consequently the prisoner had misrepresented his real character and position, and thereby had made the false pretence alleged in the indictment.

The falsehood of the pretence, supposing this construction to be correct, being amply proved by the evidence, I left the case to the jury, holding that the contention of the prosecution was consistent with law, but leaving it to them, that if they thought the letter did not prove the false pretence as alleged in the indictment the prisoner should be acquitted.

The jury convicted, and the prisoner was admitted to bail to appear to receive sentence at the next quarter sessions.

The question was whether upon the facts proved the defendant was properly convicted upon this indictment.

1877

THE QUEEN v. COOPER.

S. Tennant, for the prisoner. The letter is perfectly consistent with the position of the writer being that of a man who has just begun, or who is just about to begin to trade largely in potatoes. The expression as "samples" in the letter is consistent with this view. The letter does not contain any statement as to the writer's past position, or as to his then position, but merely statements of what the writer intends or hopes to do in the future. Even if the letter is capable of the interpretation sought on the part of the prosecution to be placed upon it, yet it is at least as capable of an innocent interpretation. It contains no express statement of existing facts, and it does not, by necessary implication, contain any such statement.

[LUSH, J. I do not think the inference need be a "necessary" inference, it must be a natural and reasonable inference.]

A promise to pay has never been held to imply a statement of present ability to pay, and the letter contains no statement of ability to pay, unless it is to be inferred from the words "I will remit you cash on arrival of goods and invoice." Both upon principle and upon authority no such inference ought to be drawn from the words. Where two constructions are possible, the Court will, notwithstanding the verdict, put upon the words and conduct of the prisoner the innocent in preference to the guilty construction. *Reg.* v. *Burrows* (1). In *Reg.* v. *Giles* (2) the conduct of the prisoner was equivalent to a pretence that she was possessed of supernatural power. No other explanation of her conduct was possible. In *Reg.* v. *Hazelton* (3) the act or conduct which deceived was accompanied by words; the prisoner not only drew a cheque which he knew would not be honoured, but said, when he gave it for the goods, that he wished to pay ready money. So in *Rex* v. *Barnard* (4), the prisoner not only wore the cap and gown of an undergraduate, but said that he was of Magdalen College. The words or conduct should *necessarily* imply the pretences charged in order to justify a conviction. *Reg.* v. *Hazelton*. (3)

Lockwood, for the prosecutor. It was not a necessary implica-

(1) 11 Cox, 258.
(2) L. & C. 502; 34 L. J. (M.C.)
(3) Law Rep. 2 C. C. R. 134.
(4) 7 C. & P. 784.

50. 11 Jur. N.S. 119

tion in *Reg.* v. *Hazelton* (1) that the prisoner had funds to meet the cheque, but it was a natural implication, and that is enough. The question is, what would a reasonable man gather from this letter? As in cases of libel, if the words can bear the alleged meaning, the question is one for the jury.

[DENMAN, J. What fact do you say is misstated in this letter?]

The whole letter appears to be that of a large dealer, and was written to make the recipient believe the writer to be a large dealer. The quantity desired as "samples" is so large that only a very large dealer could require it. In *Reg.* v. *Giles* (2) Blackburn, J, says: "It is not requisite that the false pretence should be made in express words, if the idea is conveyed." The letter taken as a whole conveys the idea of the writer being of good position, in large trade, and able to pay.

Tennant in reply.

LORD COLERIDGE, C.J. The prisoner has been convicted of obtaining goods by false pretences, and the question which we have to consider is whether there was evidence upon which the jury were justified in convicting. The letter, which is set out in the case, constituted the sole evidence of the making of the false pretences charged in the indictment. [His Lordship read the letter.] The true principle to be applied to cases of this kind is that laid down by Lord Blackburn in the case of *Reg.* v. *Giles* (2), where he says that it is necessary to consider what is the idea intended to be conveyed. The question is, what was intended to be conveyed by the particular words used or by the particular conduct? If the words can reasonably convey that which is charged as the false pretence in the indictment, and if they were meant by the prisoner to convey that which is so charged, and if, in fact, they did convey that which is charged, the offence is as complete as though the false pretence had been made in express words. This letter which I have read was meant to tell the prosecutor that which the indictment charges the prisoner with having falsely pretended, or at any rate it is reasonably consistent with the

(1) Law Rep. 2 C. C. R. 134.

(2) L. & C. 502; 34 L. J. (M.C.) 50, at p. 53.

1877

THE QUEEN v. COOPER.

alleged false pretence, and the goods were obtained by reason of the prosecutor having attached such reasonable meaning to it, and the jury have convicted the prisoner. The conviction must stand.

MELLOR, J., concurred.

LUSH, J. The question for our consideration is, was there evidence on which the jury could reasonably convict the prisoner of the offence charged? The pretences charged are that "he then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business;" that he "then was in a position to do a good trade in potatoes;" and that he "then was able to pay for large quantities of potatoes as and when the same might be delivered to him." The pretence, in order to justify a conviction, must be of existing facts. It may be made either by words, or by acts. It is sufficient if it can be reasonably and naturally inferred from the words, or from the acts, in order to raise a question for the decision of the jury. It is not necessary that the words or that the acts should be capable, only, of the meaning charged by the indictment. If the words in the letter written by the prisoner in the present case were intended to mean, and are fairly capable of meaning, that which is charged, and if they were so understood, then there was as much a pretence as though the letter had contained a definition of their meaning. The words here are capable of supporting the pretences charged. Without further explanation this large quantity is asked for as a sample, and then the prisoner says he will remit, and talks of the trade to be done. The letter is fairly capable of representing and conveying to the mind of the reader that the defendant was a man dealing largely, and in a position to do a good trade, and remit at once on delivery. The jury have adopted this construction, and have found that the prosecutor did so read the letter, and that the prisoner intended it to be so read. I therefore think the conviction right.

DENMAN, J. I have entertained and still do entertain some doubt in this case, viz., whether the letter does contain any representation of an existing fact. If it does not, the conviction

cannot stand. There is, however, one statement which when construed by the light of, and with the assistance of, the case of *Reg.* v. *Giles* (1) may fairly, I think, be considered as a statement of fact. I assent, therefore, to the judgment of the Court upon this ground, that the words "I am sure a good trade will be done" amount to a statement as to the writer's position, or at any rate raise a question for the jury as to whether they do not amount to such a statement. The words "I will remit," &c., import no present ability, they amount only to a promise, but the statement that he is sure that a good trade will be done, when at the time he knows, and is sure, that it will not, is a misstatement, I think, of fact, a mis-statement as to his position. It is enough, in order to sustain the conviction, that one false pretence by which the prosecutor was induced to part with his goods should be proved, therefore I agree that the conviction should be affirmed.

POLLOCK, B. At first I felt considerable doubt about this case, but I come to the conclusion that the conviction should be affirmed. I agree that the words must be fairly and reasonably capable of bearing the meaning charged, and in this case I think they are. I take this letter as a whole, and as a whole it is the letter of a man who desires to convey that he is what he is not, viz., a substantial dealer, able to take this large quantity as a sample. The jury were warranted, I think, in the conclusion at which they arrived.

Conviction affirmed.

Solicitor for prosecution: *E. K. Binns, Sheffield.*
Solicitor for prisoner: *Fairburn, Sheffield.*

(1) L. & C. 502; 34 L. J. (M.C.) 50.

1877
April 19.

THE QUEEN *v.* THE JUSTICES OF MIDDLESEX.

Mandamus—Justices' Review of decision of—Conviction quashed on Point of Form—Preliminary Objection—5 Geo. 4, c. 83, s. 4.

11 QBD 705

The appellant was convicted by a metropolitan police magistrate under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . . using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects." The conviction described the offence as "unlawfully using certain subtle craft, means, and device" (omitting the words "by palmistry or otherwise"). Upon appeal to the Middlesex Sessions, the proceedings commenced with an objection from the appellant that the omission of the above words made the conviction bad. The justices, after hearing the point argued, retired, and on their return the assistant judge gave what purported to be the decision of the sessions, quashing the conviction on the objection taken to it. Upon application for a mandamus to the sessions to hear the appeal on the merits, it was proposed to shew by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of a majority of the justices forming the Court, and that after such opinion had been communicated to him, he persisted in giving his decision as that of the sessions:—

Held, first, that the order of sessions having been duly recorded, it was too late to inquire whether it did or did not represent the opinion of the majority of the justices. Secondly, that the decision upon the form of the conviction was not a decision upon a preliminary matter, but a hearing and adjudication upon the merits, which upon a mandamus could not be reviewed.

Upon application for a mandamus to the justices of Middlesex, the facts as disclosed by the affidavits were that in October, 1876, an information preferred against one Henry Slade before a metropolitan police magistrate, under the Vagrant Act, 5 Geo. 4, c. 83, s. 4 (1), was heard, and he was convicted and committed to hard labour for three months. The conviction stated that Slade was convicted of being a rogue and vagabond within the intent and meaning of 5 Geo. 4, c. 83, "An Act for the punishment of idle and disorderly persons, and rogues and vagabonds"—"For that the

(1) 5 Geo. 4, c. 83, s. 4: "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects . . . . shall be deemed a rogue and vagabond within the true intent and meaning of this Act, and it shall be lawful for any justice of the peace to commit such offender" (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses) "to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months. . . ."

said H. Slade, on September 15, 1876, at No. 8, Upper Bedford Place, Middlesex, &c., did unlawfully use certain subtle craft, means, and device, which subtle craft, means, and device were that the said Henry Slade did then and there write on a certain slate then and there produced by the said Henry Slade certain words purporting to be, and which he intended to represent to E. R. Lankester and H. B. Donkin as being, words written on the said slate by the spirit of a certain person then deceased." Upon appeal to the Middlesex Sessions, the conviction was read, and the counsel for the defendant at once stated that he objected to it on the ground that it did not follow the statute, inasmuch as the words "by palmistry or otherwise" were not inserted after the words "subtle craft, means, and device." The assistant judge asked the counsel for the prosecution whether he wished to amend the conviction by adding the words in question. In reply it was said that the words were advisedly omitted, and that no amendment was asked for. The objection to the form of the conviction was then argued, and after the argument the counsel for the prosecution proposed to reconsider his decision and to ask for an amendment. The assistant judge said that it was too late to allow the amendment, and having retired with the other justices, returned to court and read a judgment to the effect that by the omission of the words the conviction was bad on the face of it, and must be quashed. A case was asked for, but refused on the ground that there was a sufficient remedy by mandamus.

Feb. 15. *A. S. Hill, Q.C.*, moved for a mandamus to the sessions to hear the appeal, on the ground that they had refused to hear it on the merits. He also moved on the ground that the appeal had not been determined by the sessions, and referred to affidavits by several of the justices to the effect that, after the Court had retired to consider the case, a large majority of the justices came to the conclusion that leave to amend the conviction ought to be given, but the assistant judge disregarded their decision, and persisted in delivering his own judgment as that of the Court, though requested by some of the justices to state that it was his own decision and not theirs.

THE COURT (Mellor and Lush, JJ.), refused to grant a rule

1877

THE QUEEN v. JUSTICES OF MIDDLESEX.

upon the last ground, thinking that after the order of sessions had been recorded without objection from the dissentient justices, it was not possible, under a mandamus, to inquire whether the order was the decision of the majority of the quarter sessions or that of a minority only, but on the first ground they granted a rule, calling on the justices to shew cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal upon the merits.

April 19. *Massey* shewed cause. First, the conviction having been quashed cannot be revived by a mandamus to hear the appeal, for the order of sessions quashing the conviction has not been brought up by certiorari, and will remain in force: *Reg.* v. *Dayman* (1); *Reg.* v. *JJ. Worcester* (2); *Rex* v. *JJ. Monmouth.* (3) [THE COURT intimated that if there were any difficulty in point of form they would amend the proceedings by granting a certiorari to bring up the order of sessions.] Secondly, the justices did not decline to exercise jurisdiction, but actually heard and determined the appeal. The objection upon which the conviction was quashed was one which necessarily arose upon the appeal, and must at some stage of the proceedings have been decided. The sessions gave a decision upon the construction of the section, and it was a mere accident that the decision was given upon the form of the conviction and at the outset of the proceedings. It was not a decision upon a mere preliminary point, but upon a substantial question of law, whether the words "by palmistry or otherwise" were words limiting the class of offence. A mandamus would therefore be inoperative, for the sessions, in obedience to it, would have to decide over again a question which they have already decided: *Reg.* v. *JJ. Worcester.* (4) In all the cases where a mandamus to hear and determine has been granted, the appeal has been dismissed or the order quashed upon some preliminary point of practice, such as want of notice, want of parties, insufficiency of grounds of appeal, or something unconnected with the merits of the case either in law or fact, or where there has been

(1) 7 E. & B. 672, 678; 26 L. J. (M.C.) 128, 132.
(2) 3 E. & B. 477; 23 L. J. (M.C.) 113.
(3) 7 D. & R. 334.
(4) 3 E. & B. 478. Per Lord Campbell, C.J.

a refusal to hear the case under the mistaken belief that there was no jurisdiction. No case can be found of a mandamus to hear an appeal after a conviction has been quashed, except where the order of sessions was bad on the face of it. *Reg.* v. *Inhabitants of Charlbury* (1), where the sessions quashed an order of removal on the ground that the examinations accompanying it were defective, *Reg.* v. *JJ. Bristol* (2), where the justices refused to convict under a mistake as to the law, *Rex* v. *Frieston* (3), *The Overseers of Ackworth* (4), *Reg.* v. *Recorder of Liverpool* (5), are cases where this Court has declined to review the decisions of justices under similar circumstances.

A. S. Hill, Q.C. (*W. Cooper* with him), in support of the rule. The objection upon which the conviction was quashed was substantially a preliminary objection. In *The Overseers of Ackworth* (4) and *Reg.* v. *Charlbury* (1), which have been relied on by the appellant, the sessions decided that there was something defective in the examinations, which was equivalent to a defect in the evidence before the Court. A decision that the omission of certain words from the conviction makes it bad on the face of it, is not a decision on the merits of the appeal. The sessions refused to grant a case upon the understanding that the proper remedy was by mandamus.

MELLOR, J. I have come to the conclusion that this rule must be discharged. The principle has been very clearly stated in the arguments which have been addressed to us, that a mandamus goes where persons having a jurisdiction to exercise decline to exercise it upon some matter preliminary to the hearing of the merits of the appeal, as regards fact or law. Indeed, Patteson, J., in *The Overseers of Ackworth* (4), rather objects to the use of the word "merits," and it is no doubt in some sense a misleading word. The question here is, did the sessions decline jurisdiction over this appeal? I am of opinion that they did not. The first point to be considered was this: A conviction was brought before them, and objection was made that the conviction was bad because it omitted

(1) 13 L. J. (M.C.) 19; 3 Q. B. 378.
(2) 3 E. & B. 479, n.
(3) 5 B. & Ad. 597.
(4) 13 L. J. (M.C.) 38.
(5) 20 L. J. (M.C.) 35.

1877

THE QUEEN v. JUSTICES OF MIDDLESEX.

certain words, and did not, therefore, disclose any offence within the statute. That is really the substance of the objection in point of form. Now the magistrates had the power to amend if they were so inclined, and I cannot help thinking that they committed an error or an indiscretion when the counsel for the prosecution expressed his willingness to argue the point upon the conviction as amended, in not amending, so that the evidence of the alleged offence might be considered, for I suppose they would have considered it if the proceedings had been amended, or else I do not see what the use of the amendment was. But ultimately they declined to amend, and they insisted upon deciding the appeal upon the conviction as it stood in point of form, and they came to a decision, erroneous as I am inclined to think, that the words did not bring the case within the statute, and therefore the defendant was not to be deemed a rogue and vagabond, but was to have his appeal allowed, and the conviction quashed. Things seem to have taken place somewhat out of the ordinary course, and I think it would have been a more discreet exercise of their judgment either to have amended in the first instance when it was suggested, or to have granted a case, when they determined upon deciding upon the form of the order as it stood. However, they declined to adopt either course, and I think they are not amenable to our control, for they have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision. I am bound by the authority of the cases which have been referred to us. Therefore the rule must be discharged, but I may add that the same difficulty would arise whatever mode of proceeding had been adopted, because the original mistake, if there were one, was in the decision of the sessions, so that it would have made no difference whether we had thought it a case in which a certiorari was the proper remedy. The same point must have arisen, whether the magistrates had done anything which was not within their jurisdiction.

LUSH, J. I have come to the same conclusion, and I own I come to it with some reluctance, because I am not at all sure

that the judicial mind of the learned judge was applied to the construction of the statute, seeing that he appears to me to make so much of the omission of words which, if they had been inserted, would not, according to my present impression, have made the least difference in the conviction, because it would then still appear that what the defendant was found guilty of were certain acts which were not acts in the nature of palmistry, and the question would still have been whether those were acts which came within the 4th section of the statute, or whether that statute was confined to acts in the nature of palmistry. But the question before us is whether the Court has decided the matter of the appeal. After the discussion upon the objection the magistrates retired, and retired, one must suppose, to consider the matter. They returned, and they found the conviction bad on the face of it. That is a decision upon the legal merits of the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. We are not a Court of Appeal from decisions of the magistrates, and, however erroneously they may have decided, we have no power to interfere. What they have decided is that the conviction, which sets out certain acts done by the defendant, is not good, because according to their view those acts do not bring the case within the 4th section of the statute. Whether that decision is right or wrong, we have here no power to decide or inquire. It is nevertheless a decision. It is no more than saying, It is no use for us to hear the evidence, because if we had heard it all, and we had come to the same conclusion as the police magistrate did, that the defendant was guilty of these acts, we should nevertheless, upon our view of the statute, hold that he was not a rogue and a vagabond within the meaning of the 4th section. Therefore this was not a preliminary objection. The sessions did not refuse to enter into the appeal on the ground of any preliminary matter. They did enter upon it and decide upon the legal merits of it.

Rule discharged.

Solicitor for prosecution: *Solicitor for the Treasury.*
Solicitors for defendant: *Munton & Morris.*

1877
June 12.

THE GUARDIANS OF NEWARK UNION, APPELLANTS; THE GUARDIANS OF GLANFORD BRIGG UNION, RESPONDENTS.

Poor Law—Removal of Pauper—Irremovability—Break of Residence—9 & 10 *Vict. c.* 66, *s.* 1.

The pauper resided in a parish in the respondent union for fifteen years continuously, when he became unable to work, and became chargeable to the respondent union. He continued to reside in the parish and to receive relief for two years and a half more, when having received notice to quit the premises which he occupied, he arranged to take a house in a parish within another union, and removed into the house with his family and slept there one night, not knowing that he was removing into another union. On the next day he was told that his residence in the respondent union had been broken, and at once returned to a house in a parish within that union:—

Held, that his removal under the above circumstances was such a break in his residence as to destroy his status of irremovability.

CASE stated under 12 & 13 Vict. c. 45, on an appeal against an order of justices for the parts of Lindsey and county of Lincoln, for the removal of Joseph Crosby, together with his wife and child, from the Glanford Brigg Union to the Newark Union.

The pauper resided in the parish of Scawby in the respondent union for fifteen years continuously, when he became unable to work, and became chargeable to the respondent union. He still continued to reside in Scawby and to receive relief from the respondents continuously for two years and a half. During such period the pauper resided in different houses, and on the 3rd of August, 1875, he took a house of one William Wilson at 2*s.* per week, for which he paid the rent until his tenancy was determined on the 13th of May, 1876, by a week's notice to quit. In the month of March, 1876, William Wilson's house was sold, and the pauper having received notice to quit, arranged (through his wife) to take a house situate in the parish of Bigby, in the Caistor Union, belonging to one George Dent, from the 14th of May, 1876, as weekly tenant. The pauper sold part of his furniture, and on the 15th of May, 1876, removed into Dent's house with all his family and all his unsold goods, chattels, furniture, and effects, and resided and slept in such house one night, namely, the night of the 15th of May, 1876. Dent's house is distant about half a mile from Wilson's, and when the pauper hired the former house

1876

NEWARK UNION v. GLANFORD BRIGG.

he was not aware that in going to live there he was removing into another union. On the 16th of May, 1876, being the weekly pay day, the pauper went as usual to the relieving officer of the respondent union for relief, but was informed that as he had removed into another union his residence in the respondent union had been broken, and relief could not be given him from such union. The pauper thereupon went and hired a house in the township of Glanford Brigg, also in the respondent union, and moved into such house on the 16th of May, 1876. The pauper subsequently made a fresh application to the relieving officer of the respondent union for relief, and on the 23rd of May, 1876, was again relieved by the respondents.

The question for the Court was, whether the removal by the pauper from the respondent into the Caistor Union, under the circumstances above set out, constituted such a break in the residence as to destroy the pauper's status of irremovability in the respondent union.

Cave, Q.C. (*H. Smith* with him), for the appellants. There was no ground for the order of removal. The pauper had acquired a status of irremovability under 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8, by virtue of residence for more than one year, and the facts shew that he had no intention of permanently abandoning his residence in the appellant union. *Reg.* v. *St. Leonard Shoreditch* (1) shews that sleeping for several nights out of a parish does not necessarily destroy the status of irremovability, but that it is a question whether the absence is temporary or permanent. *Reg.* v. *Whitby Union* (2) is a similar case.

[LUSH, J. The last case went on the ground that the pauper being a lunatic did not voluntarily quit her place of residence.]

A single night's absence under the circumstances mentioned in the case ought not to make the pauper removable.

Appleton, for the respondents, was not heard.

MELLOR, J. I think the order of removal was right. The simple question is, did the pauper during any period cease to

(1) Law Rep. 1 Q. B. 21. (2) Law Rep. 5 Q. B. 325.

1877

NEWARK UNION v. GLANFORD BRIGG.

reside in one parish and go into another? There can be no doubt that he left the parish with the intention of residing elsewhere, though he returned after a night's absence.

LUSH, J. I am also of opinion that the pauper did cease to reside within the respondent union, and that, therefore, he did not come within the words of 9 & 10 Vict. c. 66, s. 1, which requires that he should have resided for the prescribed period next before the application for the warrant.

Judgment for the respondents.

Solicitors for appellants: *Collyer-Bristow, Withers, & Russell.*
Solicitors for respondents: *Swann & Co.*

June 1.

ATHERLEY *v.* HARVEY.

Interrogatories—Libel, Questions as to Publication of—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *subs.* 11—*Supreme Court of Judicature Act*, 1875, *Order XXXI., Rules* 1, 5.

Interrogatories asking the defendant whether he has composed or published an alleged libel are objectionable, and will be struck out without requiring the defendant to object to them by way of answer.

MOTION to rescind an order of Lush, J., at chambers, ordering interrogatories delivered by the plaintiff to be struck out.

The second and third paragraphs of the statement of claim charged the defendant with the publication of two libels respecting the plaintiff, which were contained in letters written by the defendant to one Captain Francis. A third libel in the form of some doggerel verses, which were stated to have been published by the defendant respecting the plaintiff, was set out in the fourth paragraph.

The defendant, by his statement of defence, admitted the publication of the two letters, disputing the meaning put upon them, but denied the publication of the third libel mentioned in the fourth paragraph of the claim.

Interrogatories for the examination of the defendant were delivered by the plaintiff, which were as follows:—

1. Were not the words which it is alleged in paragraph 4 of the

statement of claim that you published or caused to be published, or some or which of them, wholly or in some and what part composed, written, printed, circulated, or sent or given away by you or with your knowledge, authority, sanction, or consent?

2. Was not a copy of the said words referred to in the preceding interrogatory sent or caused to be sent to the plaintiff's wife by you or by some other and what person, with your knowledge, authority, sanction, or consent?

Upon application at chambers, Lush, J., ordered the above interrogatories to be struck out.

The plaintiff moved by way of appeal.

The motion was supported by an affidavit of the plaintiff's wife, stating that she had received by post the verses in question, and believed they were sent by or by the direction of the defendant.

C. Bowen, in support of the application. The order to strike out the interrogatories was made upon the ground that in equity a bill of discovery in aid of an action of libel would be demurrable. The practice is thus stated in Daniell's Chancery Practice, 5th ed. vol. 2, p. 1409. "A bill of discovery in aid of an action at law will not be entertained where the whole object of the bill is to obtain discovery of matters which would, if established, subject the defendant to penal consequences, nor, it seems, where the discovery is sought in aid of an action for a mere personal tort," citing *Glynn* v. *Houston* (1); and again, vol. 1, pp. 481, 482. "Demurrers to discovery may be arranged under the following heads: 1. That the discovery may subject the defendant to pains and penalties, or to some forfeiture, &c. If, therefore, a bill alleges anything which, if confessed by the answer, may subject the defendant to a criminal prosecution—the defendant may object to the discovery." This shews that the practice is peculiar and cannot be extended to common law proceedings, otherwise interrogatories would not be allowed in an action of tort.

[LUSH, J., referred to Wigram on Discovery, 2nd ed. p. 80, s. 130: "If a question involves a criminal charge, the plaintiff is not entitled to an answer to such question, however material it may be to the plaintiff's case:" citing *Thorpe* v. *Macauley*. (2)]

(1) 1 Keen, 329.

(2) 5 Madd. 218, at p. 229.

1877

ATHERLEY v. HARVEY.

In *Osborn* v. *London Dock Co.* (1) the plaintiff objected to answer interrogatories as to alleged fraudulent practices, on the ground that he would be liable to be indicted. The objection was fully argued, and Parke, B., observes, p. 702: "The 51st section of 17 & 18 Vict. c. 125, says that the party may be interrogated 'upon any matters as to which discovery may be sought.' It does not say that the power is limited to cases in which a bill of discovery will lie." The interrogatories were allowed, leaving the plaintiff to object by way of answer.

[LUSH, J. May there not be a distinction, in allowing questions to be put, between those which on the face of them have a tendency to criminate, and those which are primâ facie unobjectionable? With regard to the latter, it may be right to leave the party to make his objection by way of answer.]

In *Scott* v. *Miller* (2), where the defendant was required to swear that his answer would have the effect of criminating him by rendering him liable to penalties, no such distinction was taken, while in *Bickford* v. *Darcy* (3) the Court overruled an objection to answer similar interrogatories, and said that in *Baker* v. *Lane* (4) they were disallowed because there was ground for thinking that they were not put bonâ fide. When no such ground existed they ought to be allowed. It is true that in *Tupling* v. *Ward* (5), where interrogatories as to the authorship of a libel were disallowed, Martin, B., in giving the judgment of the Court, says that they ought not to permit such questions to be asked; but in later cases, *Bartlett* v. *Lewis* (6), *Atkinson* v. *Fosbroke* (7), this ruling was not followed. It may well be doubted whether the privilege only exists for the purpose of protecting the defendant from collateral criminal proceedings. At any rate, the person claiming a privilege ought to be required to assert it in his answer. Coming to the later cases, in *Edmunds* v. *Greenwood* (8) and *Villeboisnet* v. *Tobin* (9) the interrogatories were refused because there were no

(1) 10 Ex. 698; 24 L. J. (Ex.) 140.
(2) 28 L. J. (Ch.) 584.
(3) Law Rep. 1 Ex. 354.
(4) 3 H. & C. 544; 34 L. J. (Ex.) 57.
(5) 6 H. & N. 749; 30 L. J. (Ex.) 222.
(6) 31 L. J. (C.P.) 230; 12 C. B. (N.S.) 249.
(7) Law Rep. 1 Q. B. 628.
(8) Law Rep. 4 C. P. 70.
(9) Law Rep. 4 C. P. 184.

special circumstances to support them, while in *Inman* v. *Jenkins* (1), where the special circumstances existed, they were allowed. In *Gourley* v. *Plimsoll* (2) and *Greenfield* v. *Reay* (3) the same principle was followed. Here the facts, as they appear from the defendant's own admissions, afford a special ground for questioning him in the manner proposed.

[FIELD, J., referred to *Anderson* v. *British Bank of Columbia* (4), as shewing that, since the Judicature Act, 1873, s. 25, sub-s. 11, the practice with regard to discovery must conform to that in equity].

The Judicature Act never intended to narrow the powers possessed by the Courts of common law.

H. Mansel Jones, for the defendant, was not heard.

MELLOR, J. We need not trouble the counsel for the defendant. If the question had been governed by the cases previous to the passing of the Judicature Act, 1873, I should have had some difficulty, for the facts brought before us seem to be very like the special circumstances which have been held to take the case out of the general rule. But I decline to go into all these cases, for I adopt the opinion of the Master of the Rolls in *Anderson* v. *Bank of British Columbia* (5). I think that the object and intention of the Judicature Act, 1873, was that the distinction between the practice in law and equity upon this subject should no longer prevail. The language of the Master of the Rolls is very clear. He says (14), "I have been referred to some decisions by judges of the common law courts upon this question. I do not intend to go through them in detail, for this reason: they all proceeded, as I understand, not upon the simple rule of equity, but upon the powers conferred on the judges by the Common Law Procedure Act. It was put in one of the cases especially by Mr. Justice Blackburn, that he did not consider that the rules of equity were binding upon them, but that they had a different power and a different discretion under the Common Law Procedure Act, and were entitled, if they thought fit, not to go so far as the courts of equity were in the habit of going. If that were so, those cases are now no authorities at all,

(1) Law Rep. 5 C. P. 738.
(2) Law Rep. 8 C. P. 362.
(3) Law Rep. 10 Q. B. 217.
(4) 2 Ch. D. 644.
(5) 2 Ch. D. at p. 654.

1877

ATHERLEY v. HARVEY.

because, since the Judicature Act, it must be taken to be conclusively settled by the legislature that where there is any conflict between the rules of law and the rules of equity, the rules of equity are to prevail, and consequently even a tribunal composed of the same judges, as men though not the same judges in their character as judges, since they are now judges of the High Court, will be no longer governed by the clauses of the Common Law Procedure Act, if those clauses conflict with the rules of equity, but will be governed by the rules of equity."

I think it would be entirely inconsistent with this view of the Judicature Act, 1873, s. 25, sub-s. 11, if we were to allow these interrogatories. The result is that the order of my Brother Lush was right, and must be affirmed.

FIELD, J. I am of the same opinion. The plaintiff has in the exercise of a right conferred upon him by Order XXXI., Rule 1, delivered to the defendant certain interrogatories in writing, and the defendant has exercised his right, under Rule 5, of calling upon a judge to strike out these interrogatories. Now it must, first of all, be observed that in giving our decision we do not say one word about the law of discovery. The practice in discovery is entirely different. This is an application with reference to interrogatories, and as it has been the practice in the Court of Chancery to append interrogatories to a bill, one question which we have to consider is, whether these interrogatories would be allowed in the Court of Chancery. We find it laid down in Daniell's Chancery Practice, vol. ii. 5th ed. p. 1409, that in equity a bill for discovery which might expose the person interrogated to criminal proceedings is demurrable. Mr. Bowen very fairly said that the practice as thus stated could not be distinguished or overruled, but he relied upon the Common Law Procedure Act, 1854, s. 51, which, he contended, gave a larger power than existed in equity, and enabled the common law judges to allow questions which could not be put in equity. He fortified his argument by referring us to a number of cases, particularly *Bartlett* v. *Lewis*. (1) But it seems to me that when we refer to the Judicature Act, 1873, s. 25, sub-s. 11, we find a stronger authority against him. The Judicature Act has intro-

(1) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.

duced uniformity in the practice. We are to take as our model not the Common Law Procedure Act but the rules of equity, wherever there is any conflict between the Act and these rules. Now, it is well established in equity that a bill of discovery for the purpose of obtaining the information which is asked for here would be demurrable, that is, the Court of Chancery would not allow the defendant to be harassed by having to answer such questions, but would prevent them from being put. I think that this rule is now binding upon us, and that the order was right.

LUSH, J. After having heard this case very fully argued, I remain of the same opinion which I expressed at chambers. In a number of cases decided before the Judicature Act, the common law judges thought that they had larger powers than the Court of Chancery in allowing interrogatories to be administered to the parties in an action. But the Judicature Act, 1873, intended to amalgamate the rules and introduce uniformity of procedure. At the date of the Act there was a difference in the procedure affecting interrogatories. In the Common Law Courts the judges thought that they had larger powers than the equity judges, while Mr. Bowen admits that the Courts of Equity would have sustained a demurrer to such interrogatories as these, that is, would not even have allowed them to be put. There was, therefore, a variance between the rules of equity and the rules of common law with reference to the same matter. Now s. 25 of the Act says that where there is such a variance equity shall not conform to the common law, but the common law shall conform to equity. We must, therefore, follow the practice of equity, and prevent such interrogatories from being put.

Application refused.

Solicitors for plaintiffs: *J. & F. Needham.*
Solicitors for defendant: *Freshfields & Williams.*

1877
June 12.

WEBB, APPELLANT; KNIGHT, RESPONDENT.

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), s. 6—*Adulteration—Gin diluted with Water.*

The appellant, a publican, was convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for "selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance, and quality of the article demanded by such purchaser." A person asked for a pint of gin at the appellant's premises. The appellant said that he had gin at 2*s.* and 1*s.* 4*d.* per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43·15 per cent. of water, that is, it was 43·15 below proof, but the mixture was not injurious to health. The magistrate found that there was no recognised standard of alcoholic strength for gin, but that it varied from proof to 20 under proof:—

Held, that whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate; and that there was sufficient evidence to justify the conviction.

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate for the district of the borough of Stoke-upon-Trent.

Upon the hearing of an information preferred by the respondent against the appellant, under s. 6 of 38 & 39 Vict. c. 63 (1), charging that the appellant "unlawfully did sell, to the prejudice

(1) 38 & 39 Vict. c. 63, s. 6: "No person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance and quality of the article demanded by such purchaser under a penalty not exceeding twenty pounds, provided that an offence shall not be deemed to be committed under this section in the following cases:—

"(1.) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

"(4.) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

Sect. 7: "No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser, under a penalty not exceeding twenty pounds."

Sect. 8: "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or convert its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed

1877

WEBB v. KNIGHT.

of one William Gifford, the purchaser of a certain article of food, to wit, one pint of gin, which was not of the nature, substance, and quality of the article demanded by such purchaser," the magistrate convicted the appellant.

The following facts were proved:—W. Gifford, the assistant to the respondent, who is the authorized inspector under 38 & 39 Vict. c. 63, went to the appellant's licensed premises, known as the Nile Street Hotel, at Burslem, on the 7th of November, 1876, and asked for a pint of gin. The appellant's barman, J. Ward, asked Gifford at what price he wanted it, stating that they had it at 2*s.* and 1*s.* 4*d.* per pint. Gifford selected a pint at 1*s.* 4*d.*, which was supplied to him. He admitted, on cross-examination, that the prices of gin varied from 2*s.* to as low as 1*s.* 1*d.*, and that he had purchased gin for analysis as low as 1*s.* Gifford then divided the pint of gin into three parts, two of which were sealed by the appellant and retained by Gifford. The other portion was sealed by Gifford and left with the appellant. Gifford at the time he sealed the samples marked them.

The two marked samples of gin were handed to the respondent on the same day, and on the 10th of November, 1876, the respondent handed the two samples to Mr. Wentworth Scott (the duly authorized analyst for the district) for analysis.

On the 18th of November, 1876, the analyst forwarded his certificate of analysis to the respondent, of which the following is the material part:—

"Sale of Food and Drugs Act, 1875.

"Sample of gin,

"Marked A 584, sealed, with key.

"Received November 10th, 1876.

"From J. E. Knight, Food Inspector.

"I hereby certify that I have analysed chemically, and have

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on or with the article or drug to the effect that the same is mixed."

Sect. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution," &c.

1877

WEBB v. KNIGHT.

otherwise examined the sample of gin referred to above, and that I find the same very largely adulterated, the under-mentioned percentages or proportions of foreign ingredients being present therein.

"Water, 43·15 per cent. (1)

"In my opinion the said sample is not so adulterated as to be injurious to health."

The appellant called witnesses and proved that when he bought the gin of the distillers it was 17 under proof, and that it was the custom of the trade in this district to purchase gin at degrees varying from 17 to 22 degrees under proof, and that the prices at which gin is usually sold by the trade in the district are for the best gin 2*s.*, and for common gin 1*s.* 4*d.* and as low as 1*s.*

On the part of the appellant, it was further contended that the article of food, namely, the pint of gin sold to Gifford as the purchaser, could not be to the prejudice of the purchaser, as he had selected a low priced gin, and that he got his value in genuine spirit, diluted only by the addition of water to accommodate the purchaser in the price to be paid, and that therefore he got a more diluted or less strong spirit, and that it was a well known fact that in the sale of gin the custom of the trade was that pure gin was an article not sold for consumption in licensed houses, and that there was no standard of alcoholic strength retailers were required to sell, and that under all the circumstances, the custom regulating the traffic in gin could not be affected by the before-named statute.

On behalf of the respondent, it was contended that when a purchaser asked for gin it was to the prejudice of the purchaser if he got gin mixed with a large percentage of water.

The magistrate, however, was of opinion that when a purchaser asked for gin he did not expect to be supplied with gin and a large percentage of water added thereto by the vendor, and that though there is no recognised standard of alcoholic strength for gin, but that it varies from proof to 20 under proof, a purchaser may well believe that when he asks for best gin he will obtain that of a strength of about proof or a few degrees under, and

(1) It was admitted in the argument that by this it was meant that the mixture contained 43·15 per cent. more water than proof gin, or, in other words, that it was 43·15 below proof.

when he asks for lower priced gin he will obtain gin of a quality between that and 20 under proof; at any rate if he ask for gin he might expect to obtain an article not more than 20 or 22 under proof. If the contention of the appellant were right, there would be no limit to the amount of water he might be entitled to add, because it was admitted in evidence that gin was sold at a less price per gallon than was paid for it, and that the profit was made only by the quantity of water that was added to the gin after it was received from the distillers. The magistrate was of opinion that such a contention was contrary to the decision in *Pashler* v. *Stevenitt* (1), and he consequently gave his decision against the appellant.

The question for the opinion of the Court was whether the pint of gin and water sold to Gifford as gin was to the prejudice of the purchaser within the meaning of the Act.

April 14. The case came on for argument and was remitted to the magistrate to say whether the liquid sold was of the nature, substance, and quality of the gin usually sold at that price in the neighbourhood.

The magistrate amended his statement as follows:—

"As to whether the liquid sold was of the nature, substance, and quality of gin usually sold at that price in the neighbourhood, I can only refer to several other cases of a similar character to the present awaiting to abide the decision of the High Court of Justice in this case, and by consent using the certificates, as also the prices paid for the gin in each case, of which the following is a list:—

Prices paid.	Name of Vendor.	Percentage of Water.
2/ per pint.	Hannah Bell	29·8 per cent.
1/10 „	Joseph Bosworth	31·5 „
1/4 „	Elizabeth Hancock	32 „
1/ „	Charles Lockett	51·10 „
2/ „	Thomas Pover	44·18 „
1/4 „	Charles Green	40.30 „
1/8 „	Albert Turner	52·28 „

"I convicted the appellant, inasmuch as he had not brought himself within the exception of the 25th section of the Act."

(1) 35 L. T. (N.S.) 862.

1877

WEBB v. KNIGHT.

Poland, for the appellant. The conviction was wrong. The appellant is not shewn to have sold an article which was not of the nature, substance, and quality of the article demanded by the purchaser. What he sold was gin, though it was perhaps weaker than might have been obtained elsewhere. [He was then stopped.]

Bosanquet, for the respondent. There is sufficient evidence to justify the conviction. The case might have been stated more clearly, but it is evident that there was no proof of a custom in the trade to mix all common gin with water before offering it for sale. *Pashler* v. *Stevenitt* (1) is in point. There the defendant, who was convicted under s. 6, had sold as gin a liquid composed of alcohol, water, and sugar in different proportions. Evidence was adduced that gin was sold by retailers at strength varying from proof to 20 per cent. under proof. The liquid was 44 per cent. under proof, and the analyst said he should call it gin whose alcoholic strength was exceedingly low. The Court upheld the conviction, Cleasby, B., saying that the justices had come to the conclusion that the mixture was not of the quality of gin as known commercially, and that it was impossible to say that they were wrong; and Grove, J., that the Court could not decide upon the evidence whether the case came within the first exception in s. 6 or not, for that this was a question of fact for the justices.

Poland, for the appellant. Here a low priced gin was asked for, a circumstance to which due weight must be given.

[MELLOR, J. The purchaser did not ask for gin of any particular quality.]

It cannot be said that he did not get what he asked for. Water is not a foreign ingredient; all gin must contain a certain proportion of it. The section is intended to prevent the sale of a different article in place of that required by the purchaser.

MELLOR, J. I should have been better satisfied if the magistrate had found the facts which we requested him to find. But I think that enough is shewn in the case to justify the conviction. The appellant was at liberty, if it were possible for him to do so, to prove that gin like his own was commonly sold in the neigh-

(1) 35 L. T. (N.S.) 862.

bourhood. He did not attempt to give any such evidence. I agree with the observations of the judges in *Pashler* v. *Stevenitt* (1), that the question whether the article is that demanded by the purchaser is one of fact for the justices; and although there is no appeal from our decision, we ought to follow the decision of a co-ordinate court unless we strongly disapprove of the grounds on which it proceeded. So far from this being the case, I think that the decision follows both the law and common sense.

LUSH, J. I am of the same opinion. We have to decide the point without the information, to obtain which we sent back the case, but I think it is sufficiently clear that the conviction was right. The term "food" by s. 2 includes every article used for food or drink by man, and although Mr. Poland has argued that the mixture is not a different article from that demanded, because gin is a compound article mixed with water, I think it must always be a question for the magistrates whether the amount of dilution is in excess of what is reasonable, or in other words, it was for them to say what quantity of water a purchaser may reasonably expect to find mixed with gin. No one, asking for gin, generally, without further description, can expect to get a bottle of proof spirit, but the magistrate has in effect found here that a purchaser would not reasonably expect to be supplied with gin containing so large a percentage of water as the sample in question. I think we must give judgment in accordance with this finding, which makes the case very similar to that of *Pashler* v. *Stevenitt*. (1)

Judgment for the respondent.

Solicitor for appellant: *Henry Tyrrell.*
Solicitors for respondent: *White & Sons.*

(1) 35 L. T. (N.S.) 862.

1877
April 18.

[IN THE COURT OF APPEAL.]

THE BANK OF MONTREAL *v.* CAMERON.

Practice—Order XIV., Rule 1—*Writ specially indorsed—Signing final Judgment—Affidavit—Corporation.*

4 C.P.D. 318, 320

Where a writ is specially indorsed under Order III., Rule 6, but the plaintiffs are a corporation, an order calling upon the defendant to shew cause why final judgment should not be signed, under Order XIV., Rule 1, cannot be obtained, because that rule requires an affidavit to be made by the plaintiff himself as to his own belief that there is no defence to the action; and an affidavit by an officer of the corporation is not sufficient.

THE writ in this action had been specially indorsed under Order III., Rule 6. The plaintiffs are a company incorporated by charter; and application at chambers was made for a summons calling upon the defendant to shew cause why final judgment should not be signed, under Order XIV., Rule 1 (1), and in support of the application the secretary of the company made an affidavit verifying the cause of action, and swearing that in his belief there was no defence to the action.

The matter was referred to the Court; and the Queen's Bench Division refused the application on the ground that Order XIV., Rule 1, required the affidavit of the plaintiff himself, who must swear to his own belief; acting on the authority of *Frederici* v. *Vanderzee*. (2)

The plaintiffs appealed.

Cohen, Q.C. (with him *Chalmers*), for the plaintiffs. *Frederici* v. *Vanderzee* (2) is at once distinguishable; there it was possible for the plaintiff himself to have made the affidavit, here it is impossible. There is not the slightest reason why corporations should not have the benefit of this rule; and the Court will give

(1) Order XIV., Rule 1: "Where the defendant appears on a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed . . ."

(2) 2 C. P. D. 70.

a wide construction to the terms of the rule, so as to include corporations, which are clearly within its spirit. A similar course was adopted in *Kingsford* v. *Great Western Ry. Co.* (1) as to the construction of s. 50 of the Common Law Procedure Act, 1854, and the Court extended the words so as to include an affidavit by the attorney of the corporation, as corporations would otherwise have been excluded from the benefit of the section. And *Christopherson* v. *Lotinga* (2) was distinguished in the same way as *Frederici* v. *Vanderzee* (3) is distinguishable from the present case. The spirit of the Judicature Acts and Rules is clearly to place corporations as far as possible in the same position as other litigants. By the interpretation clause, Order LXIII., "Person" includes a body corporate. [He also referred to *Sheehy* v. *Professional Life Assurance Co.* (4) and *Yarborough* v. *Bank of England.* (5)]

Pollard, for the defendant, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this appeal must be dismissed. The application is for an order under Order XIV., Rule 1, which is in the following terms:—[The Chief Justice read the rule.] In this case the plaintiffs are a corporation, and the affidavit has been made by the secretary. It is admitted that the affidavit is not within the terms of the rule, and it is manifestly not within the literal terms, but we are asked to say that it is within the spirit of the rule. I decline to inquire what the framers of this rule meant beyond what is to be gathered from what they have said. The rule is evidently drawn without any reference whatever to corporations; and when a rule is clear and unambiguous, I object, because some temporary or even lasting inconvenience may ensue from giving the words their plain meaning, to strain and stretch the words so as to include a case which, it may be, ought to have been included, but which, according to the plain meaning, they do not include. It is unnecessary to say more of *Kingsford* v. *Great Western Ry. Co.* (1) than that it was

(1) 16 C. B. (N.S.) 761; 33 L. J. (C.P.) 307. 10 Jur N.S. 804.
(2) 15 C. B. (N.S.) 809; 33 L. J. (C.P.) 121. 10 Jur NS. 180
(3) 2 C. P. D. 70.
(4) 2 C. B. 211, 291; 26 L. J. (C.P.) 301; 27 L. J. (C.P.) 233.
(5) 16 East, 6.

(2) 8 C 3 Jur N.S. 748: 4 Jur N.S. 27.

1877

BANK OF MONTREAL v. CAMERON.

decided under a statute the words of which correspond in no respect with the words of the Order now before us.

BRAMWELL, L.J. I am of the same opinion. I do not suppose the framers of these rules intended to exclude corporations, but I do suppose that corporations were not present to their minds when framing this rule; and it is no disparagement to them, who have expended infinite pains and labour in framing the rules, that the case of corporations may not have occurred to them. Of course if the words had expressly named corporations in the commencement, then the rest of the rule must have been construed by some kind of cy près process, so as to include corporations in all its provisions. But the words are simply, "the plaintiff may on affidavit swearing that in his belief" do so and so; that may well mean only a plaintiff who is capable of swearing to his belief. It may exclude corporations if the context will not admit of that construction, or it may include them if the context will admit of it. Now are the words here capable of application to a corporation? The only way that this can be done is by construing the words "his belief" into "his, the deponent's belief." The consequence of such an interpretation would be, that where the plaintiff is a single person, some one else might make the affidavit on his behalf. But is it possible to say, reading this rule in its plain meaning, that a plaintiff might make this affidavit by his clerk? If, then, we cannot include corporations without extending the same construction to all plaintiffs, we cannot hold that the rule includes corporations. I concur with what the Chief Justice has said as to *Kingsford* v. *Great Western Ry. Co.* (1) Here is a benefit given to those who can perform the condition. It is no part of the general conduct of every cause, as discovery; and I see no reason, because there is a class of plaintiffs who can take the benefit if we read the rule in its obvious meaning, why we should not abide by the words. It is very much better to abide by the plain meaning of the words, than to stretch them to meet a case which they obviously do not suit, and let the oversight, if it is one, be set right by the proper authority.

(1) 16 C. B. (N.S.) 761; 33 L. J. (C.P.) 307. 10 Jur. N.S. 804

1877

BANK OF MONTREAL v. CAMERON.

BRETT, L.J. I am very sorry to be obliged to agree. I believe I was one who took part in framing this rule, and no doubt we had not in our minds corporations. It was held in *Frederici* v. *Vanderzee* (1) that the plaintiff must do the act, viz., make the affidavit himself. It is not a right generally conferred on a plaintiff, but only on doing a certain act. In the nature of things a corporation cannot make an affidavit, nor can a corporation swear to belief; therefore the act required by this rule to be done cannot be done by a corporation, consequently a corporation cannot take advantage of the rule. In one sense, no doubt, the framers of this rule did not mean to exclude corporations; but it is equally clear that they did not intend to include them, because corporations were not present to their minds at the time. There are good reasons why this rule should not be stretched to include corporations. It is to be observed that the framers of the rules when they intended to deal with corporations knew how to do it. Thus, when it is intended to confer a benefit or impose a liability on a corporation they knew how to do it, as in the case of service of writs, or the administering of interrogatories. When, therefore, in a particular case, those who know how to provide for corporations do not do it, it must be taken to be a casus omissus. As there is no reason why corporations in this particular case should not be put on the same footing as other plaintiffs, no doubt the rule will shortly be amended for the purpose. But the rule as it stands must be construed as the Court have construed it, and I do not think it would be right to apply the mode of interpretation, which was applied in *Kingsford* v. *Great Western Ry. Co.* (2); nor is it applicable to the words of the present rule.

Appeal dismissed.

Solicitors for plaintiffs: *Bischoff, Bompas, Bischoff, & Co.*
Solicitors for defendant: *Norton, Rose, Norton, & Brewer.*

(1) 2 C. P. D. 70. (2) 16 C. B. (N.S.) 761; 33 L. J. (C.P.) 307.

1877
April 21.

THE GUARDIANS OF CLIFTON UNION, APPELLANTS; THE OVERSEERS OF LIVERPOOL, RESPONDENTS.

Poor Law—Adjudication of Settlement—Order of Removal unappealed against—Proof of Execution of Order of Removal—Acknowledgment by Relief.

Where after an order of removal the parish of settlement acquiesces in it by relieving the pauper in the removing parish, the order, though not executed by actual removal, is, upon proof that it was unappealed against, a conclusive adjudication against all persons of the settlement of the pauper at the date of the order.

UPON appeal to the quarter sessions for the borough of Liverpool against an order of justices for the removal of John Davis from the parish of Liverpool to the union of Clifton, as the place of his last legal settlement, the recorder confirmed the order, subject to the following case:—

1. The pauper John Davis was born on the 17th of November, 1842, in the parish of St. Philip and Jacob, which now forms part of the appellant union. His parents were John and Martha Davis, of whom John Davis is still living; Richard Davis and Elizabeth Davis (the parents of John Davis, the father) died respectively in the years 1844 and 1838.

2. Neither the pauper John Davis nor his parents did any act whereby either he or they acquired a settlement in his or their own right. The respondents, in support of the order of removal, relied (amongst other things) upon the settlement of the pauper by birth in the parish of St. Philip and St. Jacob.

3. The appellants, with a view of displacing the settlement by birth, alleged in their grounds of appeal (inter alia): (a.) That the pauper's grandfather, Richard Davis, acquired a settlement by apprenticeship in the parish of Bedminster, in the Bedminster Union. (b.) That an order for removal of Richard Davis was made by two justices for the county of Gloucester on the 22nd of February, 1810, adjudging that the last place of settlement of him, his wife, and two children, was then in the parish of Bedminster, and directing their removal from the parish of St. Philip and Jacob to the parish of Bedminster, and that the order was duly executed, and that there was no appeal against the order.

(c.) That Richard Davis, after such removal from the parish of St. Philip and Jacob to the parish of Bedminster returned to and resided in the parish of St. Philip and Jacob with his wife and children, and whilst so residing there received relief from the parish of Bedminster.

4. There was no actual evidence of the settlement by apprenticeship except by the production of the order next mentioned, from which it was argued that some ground of settlement ought to be inferred.

5. The appellants, in support of these contentions, produced an order dated the 22nd of February, 1810, which was made by two justices of the peace for the county of Gloucester, directed to the church or chapel warden and overseers of the poor of the parish of St. Philip and Jacob and to the church or chapel wardens and overseers of the poor of the parish of Bedminster, whereby the justices adjudged that the place of the last legal settlement of Richard Davis, the grandfather of the pauper, and his wife Elizabeth and their two children Sarah and John (the father of the pauper, and then aged about eleven months), was then in the parish of Bedminster, and ordered that the church or chapel wardens and overseers of the poor of the parish of St. Philip and Jacob should forthwith remove and convey them into the parish of Bedminster, and deliver them over to the church or chapel wardens and overseers of the poor there (together with the order or duplicate or true copy thereof).

6. [The case then set out an indorsement on the order of removal, which was relied on as evidence of the removal of the pauper.]

7. The proper books for the entries of appeals in the custody of the clerk of the peace for the county of Gloucester had been examined for the years 1810, 1811, and 1812, and no entry therein appeared of any appeal against the order of removal.

8. Henry Hodson, the removal officer for the Bedminster Union, produced the relieving officer's relief lists and the application book from 1836 to 1844 both inclusive. By entries therein it appeared that the Richard Davis and Elizabeth his wife and their two children then residing in the parish of St. Philip and Jacob were in receipt of relief, both of money and food, from the parish of

1877

CLIFTON UNION v. OVERSEERS OF LIVERPOOL.

Bedminster from the beginning of 1836 to the end of the March quarter, 1838, when the wife's name was struck out and "dead" written opposite to it; that from 1838 to 1844, when he also died, Richard Davis, with his two children still living in the parish of St. Philip and Jacob, received similar though somewhat reduced relief from the parish of Bedminster. At the supposed date of his death, in the year 1844, there appeared an entry of the fact and of the discontinuance of the relief accordingly. All these entries were in the handwriting of one Benjamin John Roome, since dead, who was then relieving officer of the parish of Bedminster. The same witness stated that he could find no relief lists or application books of the parish of Bedminster prior to 1836.

9. John Davis, the father of the pauper, was called as a witness, and stated that from the earliest date he could remember his parents, Richard and Elizabeth Davis, were living in the parish of St. Philip and Jacob, and he remembered, during such residence, his parents receiving relief in food and money from the parish of Bedminster, and that his father was a cripple whom there would have been some difficulty in actually removing. He never remembered his father or family residing elsewhere than in the parish of St. Philip and Jacob.

10. The recorder found as a fact that the order of removal of the pauper's grandfather was obtained from two justices in the usual way, and that after that order, at all events between the years 1836 and 1844, the pauper's grandfather received relief from the parish of Bedminster, who paid, at all events during those years, to the pauper's grandfather while residing in the parish of St. Philip and Jacob, such an amount as he would have been entitled to if he had been really settled in and removed to the parish of Bedminster. He further found as a fact, if he was entitled to do so on the above evidence, that the pauper's grandfather never was actually removed under the order, and that the order never was executed excepting so far as acquiescence by the payment and relief is an execution of the order. If he was entitled to do so on the evidence, he found that the parish of Bedminster, from the time of making the order, consented to pay and paid to the pauper's grandfather such relief as aforesaid, with-

out any actual removal, and he held that the parish of Liverpool, not being a party to the order, were not bound by it unless it was executed by actual removal. He therefore confirmed the order of removal.

E. Clarke, for the respondents. It is admitted that there was evidence to support the finding of the recorder as to the payment of relief from the time of making the order of removal of Richard Davis; but it is contended that the order never having been executed by the actual removal of the pauper, did not bind the respondent parish of Liverpool, though it might have been binding on the parish of Bedminster.

[LUSH, J. What difference would an actual removal have made to the parish of Liverpool? That parish could have made no objection.]

In the cases which shew that an order of removal unappealed against is conclusive against all the world as to the settlement of a pauper, the order has always been executed.

J. F. Clerk, for the appellants, was not heard.

LUSH, J. I think that the arrangement for the relief of Richard Davis in the removing parish amounted to an execution of the order of removal. The birth settlement was therefore superseded by the derivative settlement, and there was no ground for the order which is the subject of this appeal.

Judgment for the appellants. Order of sessions quashed.

Solicitors for appellants: *Gregory, Rowcliffes, & Co.*
Solicitor for respondents: *C. H. Sadler.*

1877
April 20.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* MONCK AND ANOTHER, JUSTICES OF BERKSHIRE.

Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76) *s.* 117—*Borough "liable to contribute in whole or in part to County Rate"—District liable to County Rate added to Borough by* 2 & 3 *Wm.* 4, *c.* 64.

By The Municipal Corporations Act, 5 & 6 Wm. c. 76, s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the cost arising out of the prosecution of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests; and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county; and shall make an order on the council of every such borough for the payment of such proportion of such sums as would have been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not passed upon such borough as the same shall be bounded according to the provisions of this Act.

Before the passing of 2 & 3 Wm. 4, c. 64, the borough of New Windsor included part of the parish of Clewer in Berks, which was exempt from the county rate, and on the passing of that Act a further part of the parish of Clewer, which part up to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough were made co-extensive with those of the parliamentary borough. The borough has a separate court of quarter sessions, and a charter containing a non-intromittant clause:—

Held, affirming the judgment of the Queen's Bench Divison, that the borough of New Windsor was liable to contribute to the account for "other purposes" in respect of the part of the parish of Clewer which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with county rate.

DEMURRER to return to mandamus to justices of Berkshire, commanding them to hear a complaint of the treasurer of the county against the treasurer of the borough of New Windsor, for non-payment of certain moneys. The following were the material facts upon the record.

Prior to 1832, the borough of New Windsor, in the county of Berks, consisted of the parish of New Windsor and of part of the parish of Clewer which had never been liable to the county rate.

The borough had from time beyond memory had a separate court of quarter sessions, and its charter contained a non-intromittant clause.

By the Boundaries Act, passed in 1832 (2 & 3 Wm. 4, c. 64), a further part of the parish of Clewer, which part had previously been liable to the county rate, was added to the borough for parliamentary purposes, but still remained for all other purposes part of the county.

By the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough of New Windsor were made co-extensive with those of the parliamentary borough; the borough of New Windsor thenceforth consisting for all purposes, of the parish of New Windsor, and of a part of the parish of Clewer, both of which had never been liable to the county rate, together with the further part of the parish of Clewer, which had been liable to county rate. (1)

In June, 1875, the treasurer of the county of Berks made an order on the council of the borough of New Windsor for payment of its proportion of the account under 5 & 6 Wm. 4, c. 76, s. 117 (commonly called "the other purposes account"), and afterwards made complaint to two justices of the county that the council had refused to pay the sums specified in the order, and required the justices to hear and determine the complaint and to issue a

(1) By the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the costs arising out of the prosecution, &c., of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests, and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county, in which a separate court of quarter sessions of the peace shall be holden, and which before the passing of 2 & 3 Wm. 4, was chargeable with or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable, after deducting, &c., if this Act had not passed, upon such borough as the same shall be bounded according to the provisions of this Act, and the council of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account, to be paid to the treasurer of such county out of the borough fund.

1877

THE QUEEN v. MONCK.

warrant for the payment of the amount. The justices refused to issue the warrant.

A rule having been obtained by the treasurer of the county calling upon the justices to shew cause why a mandamus should not issue commanding them to hear and determine the complaint, the Queen's Bench Division after argument made the rule absolute. *Reg.* v. *New Windsor* (1).

The mandamus was accordingly issued and a return made by the justices on behalf of the treasurer of the borough. To this return there was a demurrer. The facts stated in the mandamus and return are substantially those which were before the Court in *Reg.* v. *New Windsor.* (1)

Formal judgment on the demurrer was given for the prosecution without argument. The defendants brought error.

April 19. *Matthews, Q.C.*, and *Bullen*, for the defendants, used arguments similar to those in *Reg.* v. *New Windsor.* (1) They also cited as to the jurisdiction of county magistrates, *Blankley* v. *Winstanley* (2); *Bates* v. *Winstanley* (3). As to the levying of the county rate, *Mercer* v. *Davis* (4) As to the liability of part of a borough, *James* v. *Green* (5); *Weatherhead* v. *Drewry* (6); *East Looe* v. *Cornwall* (7)

Cave, Q.C., and *H. D. Greene*, for the prosecutors.

April 20. LORD COLERIDGE, C.J. In this case we do not think it necessary to trouble Mr. Cave with any further argument. I may be permitted to say that, as far as I am capable of judging, Mr. Matthews' argument has exhausted the case, and he has said everything that is possible to be said on his side. For a considerable period of his argument I was of opinion that his construction was right, but on further consideration I am of a different opinion, though I do not mean to say that there are not difficulties.

This was a mandamus to two justices of Berkshire, ordering them to hear and determine a complaint of the county treasurer against the treasurer of the borough of New Windsor for non-

(1) 1 Q. B. D. 152.
(2) 3 T. R. 279.
(3) 4 M. & S. 429.
(4) 10 B. & C. 617.
(5) 6 T. R. 228.
(6) 11 East, 168.
(7) 3 B. & S. 20; 31 L. J. (M.C.) 245.

payment of a certain proportion of money which had been expended for purposes other than the prosecution, maintenance, conveyance, and transport of felons. The question arises upon the 117th section, and the sections connected with it, of the first Municipal Corporation Act, 5 & 6 Wm. 4, c. 76. The important words are, that the treasurer of every county shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than those which I have just described; and twice a year he shall send a copy of the account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which before the passing of the Boundaries Act "was chargeable with or liable to contribute in whole or in part to the county rate of such county," and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable, after deducting all sums of money received in aid of the county rate, if this Act had not passed. The question is, whether these words apply or do not apply to the borough of New Windsor, as such a borough.

The borough of New Windsor has had, time out of mind, a separate quarter sessions of the peace. At the time of the passing of the Boundaries Act a certain portion of the parish of Clewer (which I will for shortness call Clewer), which had been theretofore part of the county of Berks, was annexed to the borough of New Windsor, and for the purposes of parliamentary representation was made part of the borough of New Windsor. Then came the Municipal Corporations Act, which said in effect that those portions of the boroughs as constituted by the Reform Act for parliamentary purposes should be portions of the boroughs for municipal purposes under the Municipal Corporations Act, and thereby the Clewer portion of Berks became a portion of New Windsor, not only for parliamentary purposes, but for municipal purposes also. No doubt before the passing of the Boundaries Act the portion of the parish of Clewer now under consideration, as it was a portion of Berkshire, did contribute to the county rate. It is also equally clear that the borough of New Windsor, as a borough, did not before the passing of the Boundaries Act, "in

1877

THE QUEEN v. MONCK.

whole or in part," contribute to the county rate. The question, therefore, is, was New Windsor at the time of the passing of the Municipal Act a borough which in whole or in part had before the passing of the Boundaries Act contributed to the county rate? That depends upon how the words "chargeable with, or liable to contribute in whole or in part to the county rate of such county," are to be construed. If they mean the borough as a borough, it is perfectly clear that as New Windsor did not as a borough "in whole or in part" before the passing of the Boundaries Act contribute to the county rate, it would not be a borough within the meaning of this section of the Municipal Corporations Act. If on the other hand the expression is to be construed as expressing the area of the borough, then New Windsor was a borough, part of the area of which did contribute to the county rate before the passing of the Boundaries Act. The whole question, therefore, really turns upon the true construction to be given to those words.

Now there are grave considerations, I admit, in favour of the construction for which Mr. Matthews contends. He said that there were boroughs which had not the benefit of a non-intromittant clause before the passing of the Boundaries Act, and were subject to the county rate, and had always paid part of it. Further he said, and he gave us the example of Leicester, that there were some boroughs in which the borough was composed of two parts—a part with regard to which there was a non-intromittant clause, and a part in which there was no such clause—and these boroughs in part contributed to the county rate, that is to say they contributed as to that part of them with regard to which there was no intromittant clause; and his argument, if there were no countervailing considerations, was valid. There are boroughs which meet both parts of the definition, which he contends must be confined to such boroughs, and he says that the Act ought not to be extended to make liable portions of a borough which had been exempt from payment of the county rate. Further, it was said, or suggested, that inasmuch as this payment was to be made by the borough fund, that is, by the whole borough, the consequence must inevitably follow that boroughs which heretofore had been exempt from payment of the

county rate would be now made liable to pay at least so much of the county rate as the newly added area heretofore had paid. Mr. Matthews is right in saying that in the great majority of the boroughs that consequence would follow. Now that, no doubt, is very strongly in favour of the construction for which Mr. Matthews is contending. Further, I believe he is right in saying that, until this decision, a contrary view of the statute has rather been taken for granted, and, at all events, in a great many instances the county treasurers have acted upon what the Court of Queen's Bench, in the case of *Reg.* v. *New Sarum* (1), supposed to be the law. I think I have stated substantially the argument which Mr. Matthews has put forward, and I say that it is a strong argument and might prevail if it were not for considerations that overpower it. First of all, it is important to see whether the construction will serve for the whole of the Act; and if it will not, that would be an argument against it; if it will serve for the whole Act, this, to my mind, might be an argument in its favour. We have had our attention drawn to s. 141, which deals with the case of boroughs which were not incorporated at the time of the passing of this Act, such as Birmingham, Manchester, and Brighton. Brighton was a strong case, because Brighton, within the memories, if not of ourselves, yet within the memories of our fathers, was a mere fishing village, and not only had no parliamentary representation, but was not, in any sense, a borough. Sect. 141 deals with places of that sort, and says there are sundry towns in England which it is desirable should be corporate towns, and points out a mode by which the Crown is empowered to create corporations in these towns, and then it goes on to say that "It shall be lawful for his Majesty by any charter, if he shall think fit, by the advice of his Privy Council, to extend to the inhabitants of any such town or borough within the district to be set forth in such charter the powers and provisions in this Act contained." Of course it is true that that might mean only such powers and provisions as could be extended, and as the question is whether this power can or cannot be extended, I do not think it was evidently contemplated that this power would be, as it has been, extensively used; and it seems to

(1) 7 Q. B. 941; 15 L. J. (M.C.) 15.

1877

THE QUEEN v. MONCK.

me to be an argument against one construction of the 117th section, that if Mr. Matthews' view be correct, then that provision cannot be extended to any new boroughs because it can only be extended to boroughs which as boroughs contributed in whole or in part to the county rate before the passing of the Boundary Act. Of course a borough taken entirely out of the county area could not, in that point of view, be within the provisions of the 117th section; and this seems to be a reason for construing the section according to Mr. Cave's view of the case, because it presents no difficulty. If it be that the area of the borough, before the Boundary Act, contributed "in whole or in part" to the county rate—if that is the true construction—it applies to a case like Brighton, because the whole area of Brighton did contribute to the county rate before the passing of the Boundary Act, whereas if Mr. Matthews' construction is adopted it cannot be so applied. That seems to be an argument not entirely without weight. That this Act can be applied, and that the provision of the Act in the 117th section can be applied to the case of a new borough, is, as I understand it, distinctly decided in the case of *Reg.* v. *Birmingham.* (1) I am unable to understand that case except upon the view that the Court of Queen's Bench must have thought that an entirely new borough might be made to contribute to what has been shortly called the account for "other purposes," although no part of it as a borough had contributed to the county rate because it had not previously an existence as a borough. Therefore it seems to me that as far as a wholly new borough is concerned, the case of *Reg.* v. *Birmingham* (1) is directly in point on the construction of this section. If that be so as to the whole of the borough, what is there to make us come to a different conclusion when the question is not as to the whole, but as to part? I confess I cannot see.

But, apart from the authority of that case, and apart from the construction I have suggested, is there or will there upon the whole be anything like real injustice effected by the construction which we put upon this statute? At first, I own I was disposed to think that there would be, and if it is unjust, as we have sometimes heard, to subject persons de novo to a burden which, whether

(1) 10 Q. B. 116; 17 L. J. (M.C.) 56.

for good or ill reasons, they have hitherto escaped, then unjust this Act undoubtedly is, because it subjects for the first time a number of persons who have been hitherto exempt, to a burden which they will have to bear. But I do not think it is unjust, if there was really no reason for the exemption, and if one can see that the exemption arose merely from the failure of the jurisdiction to enforce payment from people who, as far as reason goes, ought to have paid. As pointed out by Blackburn, J., the inhabitants of great boroughs in a county have really had for more than a century at least, the benefit of county expenditure in a great many ways without contributing to it, and they have not contributed to it because there was no means known to make them contribute. They have not to contribute even now to the same extent to which other inhabitants of the county have; but if for the general purposes of that borough and for the general advantage of that borough a piece of the county has been brought under the authority of the borough justices on the one hand, so on the other hand the authority of the county justices is indirectly brought in over the whole of the borough in respect of such portion of the county as has been made part of the borough, and to the extent to which that portion of the county has heretofore contributed to the county expenses.

I think that Mr. Cave's construction is one which the words will bear, but I think that if there were merely grammatical considerations to be taken into account the balance of opinion would be in favour of Mr. Matthews' construction. But that cannot be so; we must look at the whole of the Act. We must look at the practical operation and must see if the construction we are about to give is one which the words will fairly bear, and is one which other considerations, common sense, reason, and authority warrant us in putting. It appears to me that those considerations do warrant me in putting this construction on the statute.

I am, therefore, of opinion that the judgment of the Court below was correct, and that it must be affirmed.

BRAMWELL, J.A. I am of the same opinion. At first I also thought that the judgment of the Court below was wrong. I thought so for a reason which has been entirely displaced, and now

1877

THE QUEEN v. MONCK.

I have come to an opposite conclusion with a feeling of certainty that my opinion is correct. The ground on which I thought the judgment was wrong at first, was this—I read the words "liable to contribute in whole or in part to the county rate" as meaning that the borough as a borough was liable to contribute to the whole or a part of the county rate. But that is an impossible construction, because there was no borough in that plight, and therefore the words "in whole or in part" must be applied not to the rate, but to the borough. That being so, my original opinion has entirely gone, and I have come to an opposite conclusion for reasons which I now state. In the first place, it seems to me manifest that new boroughs, the creation of which the statute contemplates, unless there has been a gross injustice intended by the legislature, or a gross oversight has been made, must have been intended to contribute to that part of the county rate with which it is sought to fix New Windsor by this proceeding. They have all the benefit of it. I have looked through all the items here, and with the exception of a charge, which possibly is one which, according to the reason of the thing, ought not to be put on the borough after it has got sessions of its own,—with that exception—they have the benefit of all the items of expense to which they are invited to contribute, that is to say, bridges, assizes, and other things. Let us look at the case of Brighton and see what an enormous injustice would have been done if it was not within section 117. I do not know what is the proportion of the rateable value of Brighton as compared with the whole county, but probably it would be a fourth or a fifth. Is it then supposable that by the Crown granting a charter of incorporation to the inhabitants of Brighton they are to be relieved from contributing to the county rate, and that the rest of the inhabitants of the county of Sussex are to have 20 per cent. added to what they paid before? It is quite impossible to suppose that. I therefore come to the conclusion that s. 117 must be applicable to new boroughs, and consequently, on the same reasoning, to new places which are added to old boroughs, if the words are susceptible of such a meaning. Mr. Cave admits they are not the aptest words that could be used. People who draw Acts of Parliament are very commonly found fault with by those who never drew an Act themselves. I suppose

1877

THE QUEEN v. MONCK.

it is impossible to foresee all the difficulties that will arise, and to use exactly precise words—to say nothing of the difficulties under which Acts are drawn up. But the words here are that the account is to be sent to the council of every borough which before the passing of the Act was "liable to contribute in whole or in part to the county rate of such county." Those words may mean one or the other of the two things—if they mean every borough which at the time of the passing of this Act, or at the time of the passing of the Boundaries Act was liable to contribute, then Mr. Matthews would be right, because this is not such a borough. But the words may mean, and in my opinion, in order to include new boroughs must mean—every borough which is a borough at the time when the notice is sent; and then they would read thus:—notice shall be sent to every borough which is a borough at the time of the sending of the notice, and which either in whole or in part at the time of the passing of the Boundaries Act contributed to the county rate. They are susceptible of one or the other of those explanations; and to my mind that explanation must be given for which Mr. Cave contends; otherwise, entirely new boroughs would wholly escape. If that explanation is given, this is a borough which, at the time of the sending of the account, has a part which at the time of the passing of the Boundaries Act contributed to the county rate. I do not know whether I have made myself intelligible; but it seems to me that the fallacy in Mr. Matthews' construction is in supposing that the section is applicable only to boroughs a part of which, at the time of the passing of the Boundaries Act, contributed to the county rate. I think that is not the meaning of it, but I think the meaning of it is that which I have endeavoured to describe. If the whole of a new borough is included within these words, upon every reason and principle a part should be. The old borough which did not contribute is not compelled to contribute for the reasons adverted to by Lord Coleridge—that it is an established condition of things, but no new exemption is to be conferred.

The consequence of our construction no doubt is this, taking—I will not say a flagrant case, because that is rather a dyslogistic expression, but taking a strong case—Godmanchester is added to Huntingdon; I do not know what the rateable value of it is,

1877

THE QUEEN v. MONCK.

but I should think it is about as much as Huntingdon. The consequence of the construction we put upon the words of the section is that Huntingdon, which was wholly exempt before, inasmuch as there is no provision for making the new part of the borough bear the sole burden of this new charge, will bear its proportion, and if that proportion is half and half, Godmanchester will have half its old burden borne by Huntingdon, and Huntingdon, on the other hand, will be burdened with half the charge on Godmanchester, which it had not before. That, to my mind, is what we may call mild confiscation. But it is admitted that this injustice or hardship has been enacted as to boroughs in the condition of Leicester, and therefore the legislature has either overlooked or deliberately disregarded that consideration. It is like that rating of mines which was discussed here a little while ago. But, after all, there is probably a sort of feeling, on the part of the legislature, that Huntingdon had got off by a defect of legislation more than anything else; that if it could be reasonably brought within the rule it might well be so, and that after all, it was not worth while discriminating and making distinctions which perhaps would come within the maxim, "De minimis non curat lex;" and the legislature may well have thought as Godmanchester and Huntingdon had cast in their lot together, they should fraternally bear each other's burdens in equal proportions. Therefore, although there is that argument, it does not weigh with me sufficiently to induce me to come to a conclusion which would involve a much greater and more grievous injustice, namely, such an injustice as I pointed out in the case of a new borough, like Brighton. Therefore, I am of opinion that the judgment should be affirmed.

BRETT, J.A. It seems to me that Mr. Matthews' argument really was that unless the construction for which he contended was adopted injustice would be done, and that if the construction for which he contended was adopted there were boroughs to which the statute would be applicable. Now, I think it will be seen as to the first point for which he contended, that he did not bring it within the rule which is applicable to construction when you are relying on the doctrine of injustice, which rule, I apprehend, is

this: Where a statute is capable of two constructions, one of which will work manifest injustice, and the other will work no injustice, you are to assume that the legislature intended that which would work no injustice. But where the injustice relied upon may be called, if it is injustice at all, injustice to one class, and the opposite construction would apply the same kind of injustice to another class, then this is no argument at all; neither is it any argument unless the injustice is manifest so that it must have been present to the mind of those who were passing the Act of Parliament. The first observation that strikes me is this—wherever it is necessary to use so elaborate an argument as was used to prove that there is injustice, that of itself shews that the injustice is not manifest; secondly, I do not think that Mr. Matthews has succeeded in shewing, in this case, that there is any injustice if the construction which would be against him be adopted. The injustice he relies upon is that certain persons who, until this statute was passed, and other things were done, had not to contribute to the county rate, would now have to contribute to the county rate. I rather agree with my Lord that the mere fact that you are imposing a tax on people is no injustice at all, for the taxes must be imposed. But I think there is another defect in Mr. Matthews' argument as to injustice in this case. In the first place, if it be injustice at all, according to his construction it would be injustice to the boroughs which he says were within the Act, and precisely the same injustice to the boroughs to which additions were made by the statute which has been discussed. Secondly, I think he omitted in his considerations of injustice the injustice done to the county. He relied entirely on the injustice done to the borough, but forgot altogether the injustice, if it be an injustice at all, which on the opposite view is done to the county; for if it be unjust to impose on people within the borough a larger burden than was imposed on them before, then, according to Mr. Matthews' construction, there would be a larger burden imposed on all the people in the county who are outside that part which is thrown into the borough. If the same rate is to be maintained there are fewer of them to bear it, therefore the burden on them must be larger. Again, it seems to me that the history of the case rather shews that what is being done instead of being an injustice is a

1877

THE QUEEN v. MONCK.

restoration of justice, for, as pointed out by Blackburn, J., the only reason why the people within a borough which had separate or distinct justices had not to contribute to the county rate was the technical reason that the county justices could not levy the rate. That, as long as it lasted, seems to me to have been unjust, for it must be admitted on both sides that the inhabitants of the borough being also inhabitants of the county had the benefit of what was done by the county, and only escaped from paying the rate by reason of that technical difficulty. If, therefore, this statute has done away with that technical difficulty and has made all those who inhabit the borough liable to the county rate, it seems to me rather a restoration of justice than a doing of injustice. Again, in the case of boroughs absolutely new, on Mr. Matthews' construction, the injustice would be greater and more manifest than in any that have been shewn. The case of Brighton has been alluded to; the case of Birmingham is the same, because although Birmingham was a borough it was only so in name; and to say that because they become boroughs and corporate bodies with separate magistrates therefore they are to have the benefit of county bridges and county expenditure and contribute nothing to them, as I have said before, seems to me to be really and manifestly unjust; whereas the injustice of which Mr. Matthews complains is certainly not manifest, and in my opinion does not exist. The argument, therefore, on which he relied, and which he elaborated so skilfully, fails to impress my mind.

As to the second matter—viz., that there were boroughs to which, according to his construction, the Act was applicable, I think that he made it out that there were such boroughs; but the vice of that argument is that if the proposition for which he contends was decided against him it would be fatal to him, because there would be nothing else but the boroughs which he wishes now to defend for the statute to apply to. Mr. Cave saw that, and tried to shew that there were no boroughs except those under discussion to which the Act would apply. I confess I think that Mr. Cave failed there, and that Mr. Matthews succeeded. But it would be fatal to Mr. Matthews if this were decided against him, though he may not succeed if it is decided in his favour. To succeed, he must not only shew that there are other boroughs to which the

statute would be applicable if his construction was correct, but that there is not a second class to which it would be applicable; because if there are two boroughs to which the construction of the Act is applicable, we must look further to see what that construction is. Therefore, in my opinion, the argument of Mr. Matthews fails, and we are left after all to construe this section according to ordinary rules. My view of this section really is that there is only one borough mentioned in the section, whereas Mr. Matthews' construction would oblige you to say that there are two boroughs mentioned in the section. There is the present existing borough to which addition has been made by the Boundaries Act. That is one borough. There was another borough before the addition by the Boundaries Act—there was another borough which did not contain that part which has been added since the passing of the Boundaries Act, but those are two boroughs different in dimension, and it seems to me that you cannot read this section as Mr. Matthews would wish to read it, unless it speaks in one part of the existing borough, and in the other part of the borough which existed before the addition under the Boundaries Act. The words of the section are—and shall "send a copy of the said account to the council of every borough"—now, what borough is that? It seems to me manifest that that is the borough now existing. It goes on—" of every borough situated within such county in which a separate court of quarter sessions of the peace shall be holden; and which "—Now what is the grammatical construction of the relative? It clearly refers to the very borough mentioned before, that is, the present existing borough. If so, then the only way after the admission of Mr. Matthews, in which you can apply the words " in whole or in part," to the existing borough is to say that those words " in whole or in part " apply to locality, and if they apply to the existing borough they must mean this and cannot mean anything else—the area which is now within the ambit of the existing borough. If that be so, and there can be only one borough, the question must be whether those who are within the area of the present existing borough or within the area of part of the present existing borough, were before the Boundaries Act liable to be rated for the county rates. That is the only way in which it seems to me you can read this section, and I come to the

1877

THE QUEEN v. MONCK.

conclusion that that must be the meaning of the words which are in dispute. That seems to me to be the foundation of the decision in the case of *Reg.* v. *Birmingham* (1)—that those words "in whole or in part" mean the area which is now within the existing borough. I think that that case is right, inasmuch as that construction does not break any rule of grammar or any ordinary rule of construction, and is not open to the objections within which Mr. Matthews tried to bring it, and that it works no manifest injustice. Therefore, I am of opinion, that the judgment of the Queen's Bench Division was right and must be affirmed.

Judgment affirmed.

Solicitors for the prosecution: *Newman, Stretton, & Co. for Morland & Son, Abingdon.*

Solicitor for the defendants: *Lott, for H Darvill, Windsor.*

June 29.

SERJEANT AND OTHERS *v.* DALE.

Prohibition—Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 8, 16—*Disqualification of Bishop—Acceleration of Right to Patronage—Requirement as to Place of hearing Cause, how far directory.*

6 QBD 385
426
7 QBD 283
7 Ap Cas 242
22 Ch D 318
325

The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the provincial courts of Canterbury and York. By s. 8, a representation under certain circumstances may be made to the bishop of illegal acts or omissions on the part of any incumbent within his diocese; and by s. 9, if the bishop is of opinion that proceedings should be taken on the representation, he shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster. By s. 16, if any bishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made . . . . the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation; and if any archbishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made . . . . the Crown may appoint an archbishop or bishop to act in the place of such archbishop in all matters thereafter arising in relation to such representation.

D. was rector of the united benefices of St. Vedast and St. Michael le Querne.

(1) 10 Q. B. 116; 17 L. J. (M.C.) 56.

1877

SERJEANT v. DALE.

The right of presentation to these benefices was first vested alternately in the Archbishop of Canterbury and the Dean and Chapter of St. Paul's, but afterwards, during D.'s incumbency, the alternate turn or right of patronage then belonging to the Dean and Chapter of St. Paul's was vested in the Bishop of London and his successors. A representation against D., under s. 7, was sent to the Bishop of London, and was by the bishop duly transmitted to the Archbishop of Canterbury. The archbishop thereupon, by instrument of requisition, required the judge to hear the matters of the representation "at any place in London or Westminster (or within the diocese of London), as you may deem fit." The judge heard the case in the public library at Lambeth Palace, which, though in the province of Canterbury, is neither in London, Westminster, nor the diocese of London, and gave judgment against D., who had notice of the proceedings, but did not appear. A monition, and subsequently an inhibition, were issued against D., and his benefice was sequestered. D. did not know that the patronage of the living had been transferred to the bishop until after the sentence had been given against him and the monition issued. After the sequestration and nine months after the sentence, he applied for a prohibition to the Arches Court:—

Held, that the prohibition must be granted, for the bishop was patron of the benefices within the meaning of s. 16, and was disqualified from acting in the matters of the representation, and D. had not acquiesced in the proceedings, and his application for a prohibition was not too late.

Quære, whether the place of trial being neither in the diocese, nor in London nor in Westminster, the proceedings were on that account void.

RULE calling upon Lord Penzance, the official principal of the Arches Court of Canterbury, and J. C. Serjeant, R. G. Morley, and J. Horwood, complainants in a cause of *Serjeant and Others* v. *Dale*, and also J. Horwood, as sequestrator of the united benefices of St. Vedast and St. Michael le Querne, to shew cause why a prohibition should not issue to the Arches Court of Canterbury to prohibit the Court from further proceedings in the cause or in relation to the sequestration, the cause being one over which there was no jurisdiction.

The material facts upon the affidavits were, that in 1847 the Rev. T. P. Dale became rector of the united parishes of St. Vedast Foster and St. Michael le Querne, in the city and diocese of London, having been presented by the Dean and Chapter of St. Paul's, as the patrons. The patronage of the benefices was then vested in the Archbishop of Canterbury and the Dean and Chapter of St. Paul's alternately, and so continued until November, 1866, when by Order in Council the alternate right of patronage then belonging to the dean and chapter was transferred to the then Bishop of London and his successors.

1877

SERJEANT v. DALE.

In April, 1876, a representation against Mr. Dale, under the Public Worship Regulation Act, 1874 (1), was forwarded to the

(1) The Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), by s. 7, makes provision for the appointment of a judge of the provincial courts of Canterbury and York, and enacts that whenever a vacancy shall occur in the offices of official principal of the Arches Court of Canterbury and the Chancery Court of York, the judge shall become ex officio such official principal.

By s. 8, if the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners of the parish within which archdeaconry or parish any church or burial ground is situate . . . . shall be of opinion

(1.) That in such church any alteration in or addition to the fabric, ornaments, or furniture thereof, has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church.

(3.) That the incumbent has within the preceding twelve months, failed to observe or to cause to be observed, the directions contained in the Book of Common Prayer, relating to the performance in such church or burial ground of the services, rites, and ceremonies ordered by the said book, &c.

Such archdeacon, churchwarden, parishioner, &c., may, if he or they think fit, represent the same to the bishop by sending to the bishop a form, as contained in schedule (B) to the Act.

Sect. 9. Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation . . . . he shall within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop touching the representation, without appeal, and if they shall state their willingness . . . . the bishop shall proceed to hear the matter and pronounce judgment . . . . If they shall not state their willingness . . . . the bishop "shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster," . . . the judge shall pronounce judgment on the matter of the representation, and shall issue such monition (if any) as the judgment shall require."

By s. 13, obedience to a monition is to be enforced by an order inhibiting the incumbent from performing any service of the church within the diocese for a term not exceeding three months, and if the inhibition remain in force more than three years from the date of the monition, &c., the benefice shall become void.

By s. 16, if any bishop shall be patron of the benefice, or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made . . . the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation; and if any archbishop shall be patron of the benefice, or of any ecclesiastical preferment held by the incumbent, respecting whom a representation shall have been made, her Majesty may, by her sign manual, appoint an archbishop or bishop, to act in the place of such archbishop in all matters thereafter arising in relation to such representation.

Bishop of London by Serjeant, Morley, and Horwood, complaining of illegal practices on the part of Mr. Dale, in the conduct of divine service. On the 3rd of May, a copy of the representation was served upon him, and as he did not submit to the direction of the bishop, the representation was transmitted to the Archbishop of Canterbury, and on the 29th of May, the Archbishop issued a requisition to Lord Penzance, judge of the Arches Court of Canterbury. This requisition recited that the representation had been transmitted, &c., and concluded, "Now we the archbishop aforesaid do hereby require you the judge aforesaid to hear and determine the matter of the said representation at any place in London or Westminster, or within the diocese of London, as you may think fit."

In pursuance of this requisition, Lord Penzance heard the matter sitting in the public library at Lambeth Palace, on the 18th of July, and gave judgment, holding that certain of the charges were proved. Mr. Dale did not appear at the hearing. On the 2nd of August a monition was served upon him to abstain in future from the practices proved against him, and on the 27th of October he was served with a summons to shew cause why an inhibition should not issue to enforce obedience to the monition. On the 12th of November the monition was issued, and on the 25th of March, 1877, a sequestration of the profits of the benefices held by him was granted.

Mr. Dale from first to last took no notice of the proceedings. In November, 1876, he became aware, for the first time, of the Bishop of London's right of patronage to the two benefices.

On the 30th of May, 1877, the rule above mentioned was obtained on the grounds, first, that the bishop's right of patronage disqualified him from acting; and, secondly, that the hearing was not within the limits specified in the requisition.

June 21, 25, 26. *Sir H. Giffard, S.G.*, and *Jeune*, shewed cause. First, with regard to the objection that the judge sat in a place other than that specified in the instrument of requisition. By s. 9, the archbishop shall require the judge to hear the matter at any place within the diocese or province, or in London or Westminster. This must mean that the archbishop is to require the

1877

SERJEANT v. DALE.

judge in general terms to hear the matter within the statutory limits, leaving the judge to sit at any place within the province which he may select. By s. 19, power is given to make rules and orders for regulating the procedure under the Act; but only so far as the same may not be expressly regulated by the Act. The observance of forms like the requisition is directory only, and does not affect the jurisdiction of the Court. The archbishop is the mere instrument to convey the representation to the judge. In all likelihood, the form was erroneously drawn up, for it never could have been meant that the judge should be disabled from sitting in Lambeth Palace.

Secondly, as to the objection that the bishop was incapacitated on the ground of interest. The bishop does not come within the meaning of the words "patron of the benefice" in sect. 16. There is no definition of the word "patron" in the Act, but the Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43, a statute in pari materiâ, defines patron as the person or persons, or corporation, who in case the benefice were vacant, would be entitled to present thereto, and then proceeds to enact expressly that it is to include persons who have an alternate right of presentation. In the absence of any such particular definition, "patron" must mean the person who has the advowson in possession. In the case of alternate presentations each has the advowson in his turn: *Reynoldson* v. *Blake*. (1) The two together may be patrons, but no one except the person who has the next turn, is a patron: *Edmunds* v. *Bishop of Exeter*. (2)

Again, the application is too late. The rule as to prohibition to the ecclesiastical court is that it will not lie after sentence, where, as here, there is no want of jurisdiction on the face of the proceedings: Com. Dig. Prohibition (D.); Admiralty (F. 9). *Mayor of London* v. *Cox* (3). Prohibition is a writ of right, but not a writ of course. If there is any discretion with regard to the issue of it, the Court will not issue it in a case where the application has been so long delayed. *Chickham* v. *Dickson* (4), and *Pool* v. *Gardner* (5) shew strongly that the delay is fatal where the defect is not on the

(1) 1 Ld. Raym. 192, 197.
(2) 5 Bing. N. C. 652.
(3) Law Rep. 2 H. L. 239, at p. 282.
(4) 12 Mod. 132.
(5) 12 Mod. 207.

face of the libel. The primary object of the writ is to keep the inferior court within its jurisdiction, not to assist the defendant: *Worthington* v. *Jeffries*. (1) It is a very reasonable rule, therefore, that when there is nothing on the face of the proceedings to shew excess or absence of jurisdiction, and therefore when it does not appear that the inferior court consciously exceeded its jurisdiction, the Court will not interfere after judgment to assist an applicant who might have brought the matter to the knowledge of the inferior court before: *Full* v. *Hutchins* (2); *Blacquiere* v. *Hawkins* (3); *Lord Camden* v. *Home* (4); are cases where a prohibition was refused in accordance with this rule, and it was recognised in *Ladbroke* v. *Crickett* (5). *Gould* v. *Gapper* (6); *Ex parte Cowan* (7); *Ricketts* v. *Bodenham* (8), are later cases shewing the unwillingness of the Court to grant a prohibition after sentence. No case can be found where the party did not know of the want of jurisdiction till after sentence, but in the interest of the public the proceedings ought only to be set aside where the inferior court has, with notice, gone beyond its jurisdiction. It must be remembered that there are pleadings in the ecclesiastical court, and the parties can plead to the jurisdiction. Where there are no pleadings the absence of jurisdiction does not appear on the record. An exception was admitted in the case of a county court where there are no pleadings, *Marsden* v. *Wardle* (9), and where objection to the jurisdiction was made at the hearing, a distinction noticed by Willes, J., in his summary of the law: *Mayor of London* v. *Cox*. (10)

Charles, Q.C., and *Phillimore* (*A. J. Stephens, Q.C.*, with them), in support of the rule. Prohibition does lie even after sentence, and though the defect does not appear on the face of the proceedings: Rogers, Eccl. Law, 2nd Ed. tit. Prohibition, 817. In the cases cited against the rule, it was either difficult to see that the inferior court had gone wrong, or the defect was merely a defect in the form of the trial. The doctrine of those cases does not

(1) Law Rep. 10 C. P. 379.
(2) 2 Cowp. 422.
(3) 1 Dougl. 378.
(4) 4 T. R. 382.
(5) 2 T. R. 649.
(6) 5 East, 345.
(7) 3 B. & Ald. 123.
(8) 4 A. & E. 433.
(9) 3 E. & B. 695; 23 L. J. (Q.B.) 263.
(10) Law Rep. 2 H. L. 239, at p. 282.

1877

SERJEANT v. DALE.

apply when the trial was before a person not authorized to hear the case at all: *Ex parte Williams.* (1) There is a distinction between an infirmity merely incidental to the proceedings and a radical infirmity. The applicant here was not aware of the defect during the proceedings: *Re The Dean of York* (2); *Dimes* v. *Grand Junction Canal Company* (3); *Brookes* v. *Earl Rivers* (4); *Company of Ironmongers of Chester* v. *Bowker* (5); *Re Foster* (6); *Roberts* v. *Humby.* (7) Co. Inst., vol. ii., p. 602, distinctly states that a prohibition in the ecclesiastical court may be granted as well after judgment and execution as before. The cases where the application for a prohibition has been held to be too late turned upon acquiescence in the jurisdiction. This is clearly explained by Willes, J., in *Mayor of London* v. *Cox* (8), who states that where the defect is of jurisdiction over the cause, and the defect is apparent on the proceedings, a prohibition goes after sentence, citing *Roberts* v. *Humby* (7), and that where the defect is not apparent, and depends upon something in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and did not bring forward, the Court may refuse the application; except where there is some excuse, such as matter newly come to the knowledge of the applicant. Here the bishop had no general cognizance over the cause, the section in express terms takes it away. The defect was not apparent on the proceedings, and therefore a plea to the merits might in certain cases amount to acquiescence; but no such plea could be ground for refusing a prohibition when the party was ignorant of the defect. In none of the cases relied on by the complainants was it suggested that there was a want of original jurisdiction. The defect was something which arose in the course of the proceedings. *Chickham* v. *Dickson* (9) and *Pool* v. *Gardner* (10) are loosely reported, and entitled to very little consideration. In *Full* v. *Hutchins* (11) the libel was for tithes over which there was jurisdiction; the defendant allowed the case

(1) 4 B. & C. 313.
(2) 2 Q. B. 1.
(3) 3 H. L. C. 794.
(4) Hard. 503.
(5) 1 Str. 639.
(6) 4 B. & S. 187; 32 L. J. (Q.B.) 312.
(7) 3 M. & W. 120.
(8) Law Rep. 2 H. L. 239, at p. 282.
(9) 12 Mod. 132.
(10) 12 Mod. 207.
(11) 2 Cowp. 422.

17 Jun 73.

(6) 5 C 10 Jur N.S. 254.

to go to trial, and then asked for a prohibition. In *Blacquiere* v. *Hawkins* (1) the objection to the attachment was that the money was trust money, and the defendant, with the knowledge of this fact, had moved for a new trial in the Mayor's Court. *Ladbroke* v. *Crickett* (2) was a suit for bottomry where primâ facie the Admiralty Court had jurisdiction, and no question as to prohibition arose. *Lord Camden* v. *Home* (3) was the case of a decree of the Prize Commissioners, who undoubtedly had jurisdiction, but were said to have put the wrong construction upon a statute. Delay in moving is only material where the Court had jurisdiction over the libel, which corresponds to the representation in this case. In *Ex parte Cowan* (4) the Lord Chancellor had general jurisdiction. *Ricketts* v. *Bodenham* (5) went on the ground that the party applying let pass an opportunity of raising the objection in the inferior court. In *Marsden* v. *Wardle* (6) the county court had in the first instance jurisdiction.

Secondly, with regard to the place of trial. The object of fixing a place for the hearing is to have the incumbent tried within the diocese. To cite a clerk out of the diocese to which he belongs is ground of prohibition. In *Reg.* v. *The Archbishop of Canterbury* (7) it was held in a proceeding under 3 & 4 Vict. c. 86, ss. 9, 11, that the archbishop, acting in place of the bishop who was patron of the preferment, was bound to require the clerk complained against to appear at some place within the diocese and not at some place within the province but outside the diocese.

[MELLOR, J. May not the Public Worship Act be regarded as in this respect enlarging the limits of the place of trial?]

The words of the requisition are words of limitation, and an enactment relating to ecclesiastical procedure must be strictly construed: *Vaux* v. *Vollans.* (8) Sect. 9, which enacts that a special case may be stated for the opinion of the judge, specifies no place for the hearing, which makes the express provision as to the place of hearing a representation, of more importance.

Cur. adv. vult.

(1) 1 Dougl. 378.
(2) 2 T. R. 649.
(3) 4 T. R. 382.
(4) 3 B. & Ald. 123.
(5) 4 A. & E. 433.
(6) 3 E. & B. 695; 23 L. J. (Q.B.) 263.
(7) 6 E. & B. 546; 25 L. J. (Q.B.) 346.
(8) 4 B. & Ad. 525.

1877

SERJEANT v. DALE.

June 29. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. We have received the greatest assistance from the learned counsel on both sides; and the full examination and discussion which the authorities bearing upon the main question underwent during the argument, namely, the question whether the applicant is too late in applying for a prohibition, have enabled us to come to a satisfactory conclusion upon a point which, upon a cursory view of the cases, appears to be left in some obscurity.

We have called this the main question, because we have never entertained any serious doubt that the action of the Court of Arches was from the first invalid, and that, had its jurisdiction been questioned at an earlier stage, a prohibition must have been awarded.

The statute 37 & 38 Vict. c. 85, confers on the judge created by s. 7 a new and special jurisdiction, and that jurisdiction is not enlarged by the judge having become official principal, and the proceedings being proceedings in the Arches Court of Canterbury. The jurisdiction which he exercises under this Act is still a special jurisdiction conferred and limited by statute, and if the conditions precedent to its exercise do not exist, the whole proceeding in the Court is coram non judice.

The course of proceeding is prescribed by ss. 8 and 9. A representation is to be made to the bishop, who is, in the first instance, to determine whether proceedings ought or ought not to be taken against the incumbent complained of. If he thinks they ought not, the matter rests there. If he thinks they ought, the parties have the option of submitting to his final decision upon the matter of the complaint. If they decline to do so, then, and then only, are the functions of the judge called into exercise. The Court is not set in motion by the parties, but by the bishop after he has "considered the whole circumstances" of the case, and has come to the conclusion that further proceedings ought to be taken. His act in invoking the jurisdiction of the Court is emphatically a judicial act.

This consideration gives force and substance to the 16th section. By the common law, a judge who has an interest in the result of

1877

SERJEANT v. DALE.

a suit is disqualified from acting except in cases of necessity, where no other judge has jurisdiction. The 16th section contemplates and provides for this contingency by giving jurisdiction in such a case to the archbishop, and requiring him to act in the place of the bishop so disqualified.

Whether the party could have waived the objection by consenting to the bishop acting, as a party can waive the common law objection of interest in the judge, we need not determine. It is certain that Mr. Dale did not know the fact that the patronage of the living had been transferred from the dean and chapter to the bishop until after sentence had been given against him and monition issued.

We cannot yield to the argument which was much pressed by Mr. Jeune, that because the Bishop of London has not the next presentation he is not a patron of the benefice within the meaning of the statute. That which accelerates the turn of one of the patrons who present alternately accelerates the turn of the other. The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security. This is the principle which underlies this branch of the 16th section, and we cannot doubt that the word "patron" was meant to include as well a bishop who has the second turn as one who has the next presentation, each being interested in avoiding the benefice. We are anxious not to be misunderstood in using this language. No right-minded person does or can for a moment entertain the thought that the right reverend prelate who was called upon to act in this case was or could be influenced by any consideration of personal interest in the proceeding. Such an idea was emphatically, though unnecessarily, repudiated in the course of the argument. The probability is the fact was not

1877

SERJEANT v. DALE.

present to his mind. The applicant stands upon his legal right, and calls upon us to give effect to it, and we feel constrained to hold that the initiatory proceedings which are made essential to give jurisdiction to the Court of Arches were, by reason of the bishop being patron of the benefice, contrary to the statute and void, and that the Court had not jurisdiction to enter upon the inquiry.

Is the applicant, then, too late to apply for a remedy which the common law gives him, and which he undoubtedly would have been entitled to had he made the application before sentence? None of the authorities brought before us, when analysed and examined, appears to us to support the proposition; and seeing that the sentence is still in operation, and that if not stayed it will or may end in deprivation, we can see no reason for limiting the right to a prohibition to that stage of the cause. The applicant has neither acquiesced in the jurisdiction assumed by the Court nor done anything to estop himself from complaining of it. He did not even know of the fact which creates the disqualification until after sentence had been given. We should require strong and explicit authority to fortify us in assenting to a proposition so repugnant to common sense and justice, as that a person should be shut out from the benefit of an objection because he did not make it before he became aware of the existence of the facts which raise it. We can find none. We need not go through the cases. They are classified and explained in the elaborate opinion of the judges delivered by the late Mr. Justice Willes in the House of Lords in the *Mayor of London* v. *Cox* (1), and so much of that opinion as bears upon the present question fortifies us in the view we have taken.

This being our opinion upon the first ground of objection, it is unnecessary to decide the second ground, namely, whether the place of trial being neither in the diocese nor in London or Westminster, the proceedings are on that account void. We need say no more than that we consider it to be an objection deserving of serious consideration.

We should before the Judicature Acts have required the applicant to declare in prohibition, in order that our judgment might be reviewed in a Court of appeal. But that proceeding is now

(1) Law Rep. 2 H. L. 239.

1877

SERJEANT v. DALE.

unnecessary, as an appeal lies against this judgment with the same advantage to all parties, and without the delay and expense of pleadings. We therefore make the rule absolute for a prohibition.

Rule absolute.

Solicitors for Rev. T. P. Dale: *Brooks, Jenkins, & Co.*
Solicitors for complainants: *Moore & Currey.*

THE QUEEN *v.* CHARLES BRADLAUGH AND ANNIE BESANT.

June 28.

Obscene Publication—Absence of Corrupt Motive—Indictment—Omission to set out Words charged as Obscene—Practice.

In an indictment for the publication of an obscene book, the fact that the book is described by its title only, without setting out any of the words charged as obscene, is no ground for a motion to quash the indictment or arrest the judgment.

Semble, that such omission of the words charged as obscene is not open to objection by demurrer or otherwise.

11 C.L.D. 509

Cited 34 W.R. 607, CA.

THE indictment which had been removed by certiorari into this Court, contained two counts charging that the defendants "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the Queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals, &c."

At the trial before Cockburn, C.J., on the 18th of June, 1877, the defendants moved to quash the indictment on the ground of its insufficiency. The Chief Justice reserved the point. Evidence was then given of the publication by the defendants, at the price of 6*d.*, of a pamphlet called 'Fruits of Philosophy,' in which certain checks upon the increase of population were described and recommended. The jury found that the book was calculated to deprave

1877

THE QUEEN v. BRADLAUGH.

the public morals, but they entirely exonerated the defendants from any corrupt motives in publishing it. A verdict of guilty was entered, judgment being postponed till the 25th of June.

June 25. The defendants in person moved to quash the indictment, or to arrest judgment on the ground that the indictment being for an obscene libel, the words supposed to be criminal in that libel ought to have been expressly specified in the indictment, which had not been done. (1)

In Archbold's Criminal Pleading, p. 58 (18th edition), it is said, "where words are the gist of the offence, they must be set forth with particularity in the indictment." In *Dr. Sacheverell's Case* (2) the judges, in answer to a question from the Lord Chancellor, gave their opinion that by the laws of England and constant practice in all prosecutions by indictment or information for crimes or misdemeanours, in writing or speaking, the particular words supposed to be criminal, ought to be specified in such indictment or information. In *Rex* v. *Christopher Layer* (3) a different opinion was expressed; but in *Rex* v. *Goldstein* (4) it was again laid down that the words in the libel must be set out. *Zenobio* v. *Axtell* (5) is to the same effect In Russell on Crimes, 5th ed., vol. iii., p. 219, it is said: "The libellous matter must be set out in the indictment, and the libel proved must appear to correspond with the statement of it in the indictment." Archbold, on Criminal Pleading, pp. 806, 808, states the law to the same effect. In Broom and Hadley's Commentaries, vol. iv. p. 408, it is explained that the indictment must have precise and sufficient certainty in order that the defendant may know what it is that he is called upon to answer. The defendants did not not know when this prosecution commenced whether they had to answer for the whole book or for the language of a part.

[COCKBURN, C.J. Suppose the prosecution had set out the whole of the book, you would still have been in the same difficulty. It is described as a book, and you must assume that that means the whole of the book.]

(1) They also moved for a new trial upon various grounds. It is unnecessary to refer to this part of the motion.

(2) 15 How. St. Tr. at p. 466.

(3) 16 How. St. Tr. 93, at p. 317.

(4) 3 B. & B. 201.

(5) 6 T. R. 162.

Even then the book as a whole, or the parts specified, ought to be set out in the indictment at length. It is not enough to merely set out the title of the book. In *Rex* v. *Curll* (1), one of the first cases on this branch of the law, the libellous passages were set out at length on the record.

Sir H. Giffard, S.G., and *Mead* (*Straight* with them), shewed cause. In *Dr. Sacheverell's Case* (2), the House of Lords decided against the opinions of the judges.

[COCKBURN, C.J. Ought not the libel to be set out to enable the defendant to demur?]

The same reasoning must apply, whether the libel is in the form of a printed book or a picture, and a picture could not be copied in the indictment. The book as a whole is indicted, and it cannot be set out regardless of its length. The precise question has come before the American courts. In *The Commonwealth* v. *Holmes* (3), where the defendant was indicted for an obscene libel, described as the 'Memoirs of a Woman of Pleasure,' it was contended that the obscene matter ought to have been set out in the indictment, but Parker, C.J., said that it never could be required that the obscene book or picture should be displayed upon the records of the court. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it. In *The Commonwealth* v. *Sharpless* (4) the indictment was for exhibiting an indecent picture, and the objection was taken by the defendant that it ought to be set out distinctly, so that he might prepare his defence, and that the Court might know precisely the charge it had to try. Tilghman, C.J., said, "Must the indictment describe minutely the attitude and posture of the figures?—I am of opinion that the description is sufficient." *Reg.* v. *Dugdale* (5) is the only English case that bears in any way on this particular point of law. In that case the defendant was indicted for having obscene works in his possession for the purpose of selling them, and for procuring them for a like purpose, but though the libels had not been set out on the indictment, the objection raised in this case was not urged by counsel. Secondly,

(1) 17 How. St. Tr. 154.
(2) 15 How. St. Tr. at p. 466.
(3) 17 Mass. Rep. 335, at p. 336.
(4) 2 Serg. & Rawl. 91, at p. 103.
(5) Dearsley & Pearce C. C. 64.

1877

THE QUEEN v. BRADLAUGH.

it is too late to raise the objection, for the defendants are in the same position now as they were before the trial, and it would have been too late to have raised the objection then. It should have been raised by demurrer. Issue had been joined, and the Court will not quash an indictment for an objection which might be taken by demurrer.

[COCKBURN, C.J. It may be taken on a motion in arrest of judgment.]

The jury have found that the book is obscene, and it is too late to move in arrest of judgment.

COCKBURN, C.J. (after stating that the application for a new trial must be refused, proceeded):—It is said that even if there can be no new trial, on the ground that the verdict of the jury was conclusive on the facts, nevertheless the indictment cannot be sustained, and that we ought now to arrest the judgment by reason of the legal insufficiency of the indictment. This contention is founded upon the proposition that in an indictment for an ordinary libel, where the libellous matter consists of words, the words must be set out so that the defendant may know what it is that he is called upon to answer, and that if he chooses to take the legal objections, which he may do on demurrer, to the sufficiency of the indictment, he may have the opportunity of doing so. We agree with that proposition. It is said, on the other hand, that it would be highly inconvenient that obscene matters should be set out upon the records of the Court, and that the same argument and the same rule would apply to the case of an indecent print which applies to the case of indecent words, and that it would be impossible, or at all events in the highest degree objectionable, to have an indecent print exhibited upon an indictment which would afterwards form part of the records of this court. We have had pressed upon us two decisions of the American courts. These decisions are not so conclusive upon us as if they were decisions of courts having equal jurisdiction in this country, but we look upon the decisions of the American courts with very great respect, and take advantage of them in the solution of questions of law. Even putting these decisions on one side, the question of convenience presses upon us strongly. I agree that where particular

passages in a work, as contradistinguished from the work itself, are made the subject-matter of an indictment, it would be highly expedient that the attention of those against whom the publication of such matters is made the subject-matter of prosecution, should be drawn to such passages, that they may have the opportunity of knowing what it is against which they are to direct their defence. On the other hand if not particular portions of a work, but the work itself in its entirety and as a whole is made the subject-matter of a prosecution, one cannot but see that it would lead to the greatest inconvenience to have the whole of the work set out from beginning to end. We were told the other day that a prosecution had recently been instituted, or was about to be instituted, in respect of the publication of the 'Memoirs of the Comte de Grammont,' on the ground that it was an indecent and obscene publication, because it describes with a great deal of particularity the licentious habits of the court of Charles II. While I do not express any opinion with reference to a prosecution founded upon the publication of a work which has existed for so many years, and has gone through so many editions, and been translated into several languages, I merely mention this as an instance of what would be the monstrous inconvenience of setting out in extenso the whole of a publication which may consist of two or three volumes. Many other works might be mentioned, which are more or less of an indecent and indelicate character, and more or less inconsistent with good morals, and which may therefore be made the subject-matter of an indictment, in which the objection to the work would be not that it contains particular passages which are objectionable, but that it is objectionable in toto; and in such instances to set out the whole work would lead to a degree of inconvenience which we cannot help taking into account.

I do not think it was competent for me upon this objection to quash the indictment. The Solicitor General has also said the defendants should have applied earlier if they desired to have the indictment quashed, and it appears to me that I went too far, and that I was not called upon to give leave to move upon the point. Another difficulty I feel with reference to the objection is that it ought to have been taken by demurrer. If the omission

1877

THE QUEEN v. BRADLAUGH.

is in the indictment—if that be the objection, and it be a valid one, it is an objection that ought to have been taken by demurrer, and, therefore, I cannot help thinking that, upon the balance of convenience we shall act more wisely in saying that the judgment pronounced upon this indictment ought not to be set aside by making the motion absolute to arrest the judgment; but if there be any valid foundation for the contention the defendants have raised upon the indictment it should be taken by demurrer.

Although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law, as being commune nocumentum—a matter complaint as to which arises from its being subversive of public morals and therefore a public nuisance, I therefore cannot feel that the authorities which have been cited for the purpose of shewing that in an indictment for libel the words must be specially set forth apply to this case. No doubt, there is the inconvenience to the defendant, that he may be put to the inconvenience and expense of a trial, when if the words were set forth, on demurrer, judgment might be given in his favour at once. The advantage of an early decision cannot be obtained under this form of indictment, and it may be that this is an advantage of which it is hard that the defendants should be deprived.

We shall, however, shelter ourselves under the decisions of the American courts, leaving the ultimate decision of this matter, an important one, no doubt, to the Court of Error. I do not think that there should be any rule for an arrest of judgment.

MELLOR, J. (The learned judge concurred in refusing the application for a new trial and proceeded):—With regard to the other point, I cannot help thinking that there is no reason why an objection of this character could not be taken by demurrer to the indictment. The objection was not taken upon demurrer and the jury have now interpreted and applied the general description of the book in the indictment as an obscene work. If it be essential to set forth the terms in which the libel was published, the point may still be taken upon error.

Rule refused.

Solicitor for the prosecution: *T. J. Nelson.*

[IN THE COURT OF APPEAL.]

1877
June 6.

OASTLER AND OTHERS *v.* HENDERSON.

Practice—Application for New Trial on ground of Surprise—Surrender of Term by operation of Law—Landlord and Tenant—Rules of Court, December, 1876, *Order XXXIX., Rule* 1.

After a trial by a judge without a jury any application for a new trial must be made to the Court of Appeal under Order XXXIX., Rule 1, whatever the ground of it may be.

Plaintiffs let a house to defendant for seven years from Lady Day, 1868. Defendant entered and occupied till Michaelmas, when he left England for America. He left the keys with an agent to dispose of the house if he could, if not, to make the best bargain he could with plaintiffs for the surrender of the term. The agent was unable to find a tenant, and gave the keys in December, 1868, to plaintiffs. They employed a house agent to let the house, and he put up bills in the house and advertised it to let, but the house was not let till Lady Day, 1872, when a new tenant went in. In 1870, for a short time, some workmen of plaintiffs occupied two rooms in the house for the purpose of plaintiffs' saddlery business. Plaintiffs having sued defendant for rent from Michaelmas, 1868, to Lady Day. 1872:—

Held, that there had been no possession of the house by plaintiffs so inconsistent with the continuance of defendant's term as to estop plaintiffs from alleging the continuance of it, so as to effect a surrender of the term by operation of law.

ACTION to recover 490*l*., being the amount of three and a half years' rent of a house from Michaelmas, 1868, to Lady Day, 1872.

Defence, that the lease under which the rent was claimed had been surrendered by operation of law before any of such rent had become due.

At the trial before Lush, J., without a jury, at the Middlesex Easter Sittings, 1877, it appeared that the plaintiffs, who are a firm of saddlers, had granted to the defendant a lease of a house in Coventry Street, the property of the firm, for a term of seven years from Lady Day, 1868, at a yearly rent of 140*l*. The defendant entered under the lease, and occupied the premises for the purposes of his business until the autumn of 1868, when, finding his business unprofitable, he left England for America. Before leaving he gave the keys of the house to one Addison, as his agent, to dispose of the premises, if possible, or to make the best bargain he could with the plaintiffs for the surrender of the term. Addison

1877

OASTLER v. HENDERSON.

being unable to find a tenant, gave the keys to a servant of the plaintiffs in December, 1868. Shortly afterwards, in the beginning of 1869, bills appeared in the windows of the house, advertising that it was to be let, and giving a reference to a Mr. Bonham, a house agent.

The house was not actually let until March, 1872, when the new tenant entered upon occupation. In the interval, during a part of the year 1870, some of the plaintiffs' workmen had occupied two of the rooms of the house for the purpose of the saddlery business.

One of the plaintiffs swore that his firm had not put the premises into Bonham's hands until March, 1872, just before they were actually let, and that Bonham's putting up of the bills and attempting to let the house in 1869 was wholly unauthorized by the plaintiffs.

The judge entered the verdict and judgment for the plaintiffs.

Shortly after the trial the defendant discovered that the plaintiffs had authorized Bonham to try and let the premises in 1869; that they had given him the keys for that purpose, and had been charged by him with the costs of the bills and advertisements. It was also discovered that Bonham, with the plaintiffs' authority, frequently showed applicants over the house during that year, and that he only returned the keys to the plaintiffs for a short time in 1870, when they wanted the use of the two rooms for their workmen.

On affidavits of these facts the defendant moved the Queen's Bench Division for a new trial on the ground of surprise. The Court granted an order nisi, which they afterwards discharged, on the ground that they had no jurisdiction, the trial having taken place before a judge without a jury, and that in such a case the application for a new trial ought to have been made to the Court of Appeal under Order XXXIX., Rule 1, December, 1876.

From this decision the defendant appealed, at the same time applying to the Court of Appeal by way of original motion.

Grantham, Q.C., for the defendant. The Court below were wrong in declining jurisdiction, for the application was rightly made to the Divisional Court, the application being on the ground

1877

OASTLER v. HENDERSON.

of surprise, not on the ground of anything done by the judge sitting as judge or jury, and it is only in the latter cases that it was intended by Order XXXIX., Rule 1, December, 1876, that the application for a new trial should be made to the Court of Appeal.

[THE COURT intimated that in their opinion the Court below were right in refusing jurisdiction.]

The defendant was entitled to judgment. There was a surrender of the term by operation of law when the keys were handed to the plaintiffs in December, 1868. The re-letting in March, 1872, clearly amounted to a surrender, and such surrender related back to the date of the giving up of the keys: *Phenè* v. *Popplewell.* (1)

[BRETT, L.J. That case is distinguishable, for there there was an actual entry into possession in the first instance.]

Talfourd Salter, Q.C., and *Edward Clarke*, for the plaintiffs, were not called upon.

COCKBURN, C.J. I am of opinion that there ought not to be a new trial. I believe that the defendant's affidavits shew correctly what the real state of facts was; but even assuming that to be so, I still do not think that they disclose any evidence of a surrender of the defendant's lease by operation of law. The facts are these: The defendant takes a lease for seven years and enters into possession, but shortly afterwards quits the premises and goes to America with apparently no intention of returning. Before going away he gives the keys to an agent, with instructions to let the premises, if he can, and if not, to try to induce the plaintiffs to accept a surrender. The agent, not succeeding in letting the premises, hands over the keys to the plaintiffs, who at once endeavour themselves to let them, but without success, until March, 1872. The plaintiffs then, by letting the premises to a new tenant, put an end to the defendant's term from that date, for they thereby did an act so inconsistent with the continuance of the defendant's term, that they were estopped from denying that it was at an end. But up to that date they had not done such an act, for they had not virtually taken possession of the premises; and in order to estop the lessors, so as to constitute a surrender by opera-

(1) 12 C. B. (N.S.) 334; 31 L. J. (C.P.) 235.

1877

OASTLER v. HENDERSON.

tion of law, there must be a taking of possession. I do not say a physical taking of possession, but, at all events, something amounting to a virtual taking of possession. But here there was no such taking of possession. The plaintiffs, the landlords, took the keys because they could not help themselves, the defendant being gone, and, for all they knew, not likely to return. Then they try to let the house, but what else, under the circumstances, were they to do? They must do the best they could. If they had let the house, they would have done so as much for the benefit of the defendant as of themselves. The mere attempting to let does not amount to an estoppel. The landlords did nothing but what they might reasonably be expected to do under the circumstances for the benefit of all parties. As for the fact that the plaintiffs' workmen used two of the rooms in 1870, I do not think that any jury ought to hold that to be equivalent to a taking of possession, for it is, under the circumstances, quite consistent with an intention to hold the defendant to his lease.

BRAMWELL, L.J. I am of the same opinion. I think it ought to be assumed, in favour of the defendant, that the new matters adduced are true. But even then I think that there is no evidence for a jury of a surrender until 1872. The keys find their way into the hands of the plaintiffs, who no doubt received, along with the keys, an intimation that the defendant wanted to get rid of his lease. Looking at all the facts of the case together, including the fact that the defendant had left the country, what would a reasonable man do under the circumstances? Why, exactly what the plaintiffs did, endeavour to let the house. That they are unable to do until 1872, and in the interval they use two of the rooms. But as the house was unoccupied and bringing in no rent, and as they probably thought that the defendant was not going to return, surely that was a very natural thing for them to do. Mr. Grantham has contended that the surrender by the ultimate letting in 1872, relates back to the receipt of the keys, and carries back with it the intention to take possession to that earlier date; and the case of *Phenè* v. *Popplewell* (1), which he has cited,

(1) 12 C. B. (N.S.) 334; 31 L. J. (C.P.) 235.

at first sight gives considerable countenance to his contention. But all that that case goes to shew is, that in that particular case, the equivocal act of using the keys for the purpose of obtaining an entrance to the premises was afterwards rendered unequivocal, and the plaintiff's intention in so using them explained by his subsequent conduct; it does not shew that the subsequent letting affected the legal character of the earlier act. And though the Court in that case were able to conclude from the lessor's after conduct that his intention in using the keys was to take possession at once, we have no materials in the present case to enable us to arrive at a similar conclusion. I am, therefore, of opinion, that a judge, if trying this case without a jury, ought, even upon the additional matters in the defendant's affidavits, to find for the plaintiffs, or, with a jury, ought to tell them that there is no evidence of a surrender, and direct a verdict accordingly.

BRETT, L.J. This is an application for a new trial of a cause which was tried by a judge without a jury. Two points were argued: first, that the Divisional Court were wrong in refusing jurisdiction, for that the Rules of December, 1876, did not apply to an application for a new trial on the ground of surprise. I am, however, on that point of opinion that the Court below were right, and that in cases of trials by a judge without a jury, all applications for a new trial must be made to the Court of Appeal whatever the ground of the application may be. The second point was that the facts of the case, including the new matters in the defendant's affidavit, which we must for the purposes of argument assume to be true, shew a surrender of the defendant's term by operation of law in December, 1868, that is to say that the lessors were, from that date, estopped from setting up the continuance of the particular estate. I am, however of opinion, that that is not the case. There can be no estoppel by mere verbal agreement; there must be in addition to such agreement some act done which is inconsistent with the continuance of the lease. If after the agreement the landlord actually takes possession or does what virtually amounts to it, if he not only attempts to let, but actually does let, then there is a palpable act done with regard to the premises raising an estoppel within the rule laid down in *Nickells* v.

1877

OASTLER v. HENDERSON.

Atherstone (1), following *Lyon* v. *Reed* (2). It seems to me that there was no act done amounting to an estoppel prior to March, 1872. The plaintiffs' workmen, were, it is true, let into two of the rooms for a time, but that was not by way of taking possession. There was afterwards, in 1872, an actual letting amounting to an estoppel, and so effecting a surrender by operation of law at that date.

Then Mr. Grantham has argued on the authority of *Phenè* v. *Popplewell* (3), that when once actual possession has been taken, the surrender must, as a matter of law, relate back to the date of the receipt of the keys. If that was the ground of the decision in that case I think that sitting in the Court of Appeal we ought to overrule it. But I do not think that that was the ground. The Court there drew an inference of fact from the subsequent conduct of the lessor that his intention in using the keys was to take possession at once. And that being so, there is a clear distinction between that case and the present, for there there was, upon the finding of the Court, a taking of possession in the first instance, to which we have nothing corresponding here.

Appeal dismissed, and Order for new trial refused.

Solicitor for plaintiffs: *Pearpoint.*
Solicitors for defendant: *Rooks & Co.*

(1) 10 Q. B. 944; 16 L. J. (Q.B.) 371. (2) 13 M. & W. 285.
(3) 12 C. B. (N.S.) 334; 31 L. J. (C.P.) 235.

THE QUEEN *v.* THE ASSESSMENT COMMITTEE OF ST. PANCRAS.

1877
June 16, 20.

Poor-rate—Rateable Occupation—Licence in Nature of Easement—Advertising Hoardings.

Where a person, in consideration of a yearly payment, had permission from the owner of land to affix to such land hoardings for advertising purposes, and such hoardings were accordingly affixed, but not in such a way as to necessitate any disturbance of the soil if they were removed, or as to indicate any intention on the part of the owner that there should be a permanent occupation of any part of the land by the person erecting the hoarding:—

Held, that such person was not rateable as an occupier of an "advertising station," and that his name was therefore wrongly inserted in the supplemental valuation list of a metropolitan parish.

6 QBD 1
10 QBD 3

CASE stated by the Court of General Assessment Sessions under the Valuation (Metropolis) Act, 1869, on an appeal against the Supplemental Valuation List of the parish of St. Pancras, made under the provisions of the above Act.

The facts were, so far as material, as follows:—

The appellant had been assessed in respect of certain advertising stations, and appealed against the assessment. The supplemental list described the property so assessed in each case as an "advertising station" occupied by James Willing, the appellant. The case stated referred to two of these assessments, numbered No. 221A and 291A in the list. The sessions had ordered that the appeal should be allowed in the case of 221A, but they ordered that the assessment should stand in the case of 291A. The statements contained in the case as to these two assessments were as follows:—

As to No. 221A. Pulvis Cottage is the name of an old dilapidated suburban villa, No 221A in the supplemental valuation list, not in the occupation of Mr. Willing, and only inhabited by a person for the purpose of taking care of the premises, and has been so since 1865, though continuously advertised to be let or sold. In front of the house there is a dwarf wall with a pier at each end, and with a break in the centre, in which the outer gate of the premises is placed. Above the dwarf wall are iron railings. Behind the wall and railings stands a row of trees. In front of the wall and railing a hoarding or framework of wood was fixed in

1877

THE QUEEN v. ST. PANCRAS ASSESSMENT COMMITTEE.

July, 1874, by the appellant, expressly for the purpose of advertisements. This hoarding rests on the ground outside the wall, and is about fifteen feet high and fifty feet long, so that it darkens the house inside, and otherwise interferes with the occupation of the premises for living purposes. The fastenings are necessary to prevent the hoarding from being blown over and from being removed. The hoarding is fixed in its place partly by being bolted to the wall and tied to the railings by wire fastenings, and partly by pieces of wood from the top of the hoarding nailed in some places to the trees inside, and in some places by struts run to the garden ground behind.

Pulvis Cottage was assessed in the valuation list of the parish in 1870, under the number 3363, and the assessment still remains there. In an extract from the list of this assessment that appeared in the case under the heading "name of occupier" was the letter E, which was stated to signify that the premises were unoccupied. The villa stands on a considerable portion of ground, having a garden back and front, but its front is brought up to within a short distance of the wall above mentioned. Between the front and the wall stands the row of clipped lime-trees above mentioned.

The owner had placed the house for letting in the hands of his solicitors, Messrs. Palmer, Eland, & Nettleship. They placed in the house a caretaker, to take charge of the house, and give information, who resided there with her family, and who had the control of the outer gate of the front garden next the road, and of the front door of the house. The outer gate was kept closed, and communication kept with the house by means of a bell, the handle of which was outside the outer wall of the front garden. The appellant had no key or right of access to the premises, or any other right inside this outer wall.

The advertisements were changed, or attended to by the appellant's agents from outside the walls. The hoarding was originally put up when the premises had been in the occupation of a Mr. Tyerman, who had at one time been the lessee of the premises. There was no evidence as to what passed between Mr. Tyerman and the appellant, but the following letters were put in evidence; a letter from the appellant to Messrs. Palmer, Eland, & Co. in the following terms: "Re Pulvis Cottage. We are willing to rent

the above of you on the same terms as we gave Mr. Tyerman, viz. 20*l.* per annum, the last rent paid to 1st July. We shall be prepared to give up possession at any time on receipt of twenty-four hours' notice;" the answer in the following terms: "We think the rent for liberty to affix boards should be at least 30*l.* a year from the 1st July; in other respects the terms mentioned in your letter of yesterday's date are quite satisfactory;" and a further letter from Messrs. Palmer, Eland, & Co. as follows: "Referring to our interview with you, we beg to say that our client will accept a rent of 25*l.* a year for liberty to affix your advertising boards, such rent to run from the 1st July last, and the letting in other respects to be subject to the terms mentioned in our letter of the 31st ultimo."

To the boards or hoardings above described was fixed, among other advertisements, the board advertising the house for letting or sale. This board was the property of Messrs. Palmer & Co. or the owner. As to these premises the Court removed the name of the appellant from the list.

As to 291 A. Upon the ground upon which the hoarding hereinafter mentioned stood, at the time of the supplemental valuation list being made out, there stood in 1870, when the valuation list was made out, a house and shop which was assessed in the list under the number 7150 as a "house and shop." The house and shop stood back from the road in a small garden, and in front towards the road there was a low wall bounding the premises. Since 1870 the owner determined to let the site for building, and the house and shop were let for building to a person who shortly after became bankrupt, having first pulled down the house and shop, and commenced to dig the foundation of the new building. Upon the premises being pulled down the assessment was taken out of the valuation list, and remained so struck out until the appellant's name was inserted as occupier.

During the time during which the person above mentioned held the premises the appellant obtained permission from him to use the place for advertising purposes to the extent hereinafter mentioned, but under what precise circumstances there was no direct evidence to shew. It was in evidence, however, that this person was succeeded by a person named West, by whose permission the

1877

THE QUEEN v. ST. PANCRAS ASSESSMENT COMMITTEE.

appellant still continued to use the premises as hereinafter mentioned. A receipt was put in which was as follows: "Received of Messrs. Willing & Co. the sum of 3*l.* 15*s.*, one quarter's rent for use of hoarding for advertising purposes, due Michaelmas Day last. Arthur West."

The appellant placed advertising boards outside the wall upon the ground in the street leaning against the outside face of the wall which ran in front of the premises as above mentioned. These boards were placed along the whole length of the wall, except at a gap which had been pulled down by the builders to admit the carts used for conveying building materials to the house, and otherwise used in the course of the building. Inside the wall, between the wall and the site of the old buildings, and between the wall and the new buildings which were in the course of erection at the time when the supplemental list was made, and at the time of the appeal, the appellant let into the earth some ordinary scaffold poles, to which, at such a height as to be seen from the street above the boards, was fastened a horizontal framework upon which the advertisements were exhibited. To further support this hoarding, struts were carried back at an angle, resting on the ground behind. These hoardings were originally erected by and remained the property of the appellant. During all the time during which these advertisements were thus exhibited, West carried on his building operations on the land, and the houses were nearly at their full height when the appeal was heard. As to these premises the Court affirmed the valuation list.

The questions for the opinion of the Court were:

1. Whether the court of assessment sessions were right in removing the appellant's name from the valuation list in respect of the premises 221A.

2. Whether the said court were right in retaining the name of the appellant in the valuation list in respect of the premises 291A.

June 16, 20. *F. M. White, Q.C.*, and *Paine*, for the appellant, contended that the advertising stations in both cases were wrongly inserted in the list, not being separate rateable hereditaments; that the appellant was not liable to be assessed as occupier of any

1877

THE QUEEN v. ST. PANCRAS ASSESSMENT COMMITTEE.

rateable hereditament, that all he had was a mere licence in the nature of an easement, and therefore his name ought not to have been inserted in the list.

Poland and *Castle*, for the respondents, contended that the appellant was the occupier of a rateable hereditament in respect of his advertising stations; that the occupation in the mode described in the case was, in the case of both the assessments, a profitable and permanent occupation of the land so as to be rateable; and that, therefore, the appellant's name was rightly inserted in the list in respect of both the stations.

[The following cases were referred to in the argument: *Bowley* v. *Chelsea Waterworks Co.* (1); *Rex* v. *Brighton Gas Co.* (2); *Rex* v. *Chelsea Waterworks Co.* (3); *Pimlico Tramway Co.* v. *Greenwich* (4); *Forrest* v. *Overseers of Greenwich* (5); *Reg.* v. *Morrison* (6); *Reg.* v. *Leith* (7); *Cory* v. *Bristow* (8); *Cory* v. *Churchwardens of Greenwich* (9); *Smith* v. *St. Michael, Cambridge* (10); *Roads* v. *Overseers of Trumpington* (11); *Reg.* v. *Whaddon* (12); *Rex* v. *Trent, &c. Navigation Co.* (13); *Rex* v. *Tewkesbury* (14); *Staley* v. *Castleton.* (15)]

MELLOR, J. I am of opinion that in determining this case, we must, in accordance with the principle laid down by the judges in the case of *Smith* v. *St. Michael, Cambridge* (10), look to what was the substance of the relation between the parties, and not to isolated expressions, such as the word "rent," used in the course of the transaction. I agree with the opinion cited by Lord Hatherley in *Cory* v. *Bristow* (16), as that of Lord Campbell, C.J., in the case of *Forrest* v. *Overseers of Greenwich* (17), viz., that in order to be rateable the occupation must be permanent in its nature. The

(1) 17 Q. B. 358; 20 L. J. (Q.B.) 520.
(2) 5 B. & C. 466.
(3) 5 B. & Ad. 156.
(4) Law Rep. 9 Q. B. 9.
(5) 27 L. J. (M.C.) 96; 8 E. & B 890.
(6) 1 E. & B. 150; 22 L. J. (M.C.) 14.
(7) 1 E. & B. 121; 21 L. J. (M.C.) 119.
(8) 2 App. Ca. 262; Law Rep. 10 C. P. 504; 1 C. P. D. 54.
(9) Law Rep. 7 C. P. 499.
(10) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(11) Law Rep. 6 Q. B. 56.
(12) Law Rep. 10 Q. B. 230.
(13) 4 B. & C. 57.
(14) 13 East, 155.
(15) 5 B. & S. 505; 33 L. J. (M.C.) 178.
(16) 2 App. Ca. at p. 275.
(17) 8 E. & B. at p. 900.

1877

THE QUEEN v. ST. PANCRAS ASSESSMENT COMMITTEE.

word "permanent" may not appear in every one of the judgments delivered at various times as a description of the kind of occupation necessary, but in the particular cases where no reference is made to the quality of permanence as being a necessary element the facts spoke for themselves with regard to this point. Assuming, therefore, that the occupation must be permanent, let us look at the facts in the present case. I can see no sound distinction between the two assessments in question. They are both cases in which, in my opinion, the effect of the facts stated is that the occupation of the property was in a person other than the party assessed. In the case of the cottage, it was a dilapidated suburban villa, only inhabited by a caretaker, and had been so for some years, though continuously advertised as to be let or sold. In front of the cottage were placed these advertising boards, as described in the case. [The learned judge here read the statements of the case as to the hoardings.] It does not appear to me that upon the facts as set forth there was anything that could be said to be an occupation of these premises, or any part of them, by any person other than the owner. While the premises remained unlet and were in the custody of a caretaker, as described, negotiations took place between the owner and Mr. Willing as to the use of the premises for the purpose of the advertisements of the latter. In the correspondence on this subject the word "rent" is no doubt used, but regarding the transaction in the manner sanctioned in the case of *Smith* v. *St. Michael, Cambridge* (1), viz., not by the light of particular expressions, such as "rent," but with reference to the substantial intention of the parties, can it be supposed that it ever was the intention of the owner, in allowing Mr. Willing to affix these hoardings, to part thereby with the exclusive occupation of any part of the premises? Or was it not rather his intention to grant to Mr. Willing what has been spoken of as a licence in the nature of an easement for the mere temporary use of the land for the purpose of advertising? It seems to me, looking at all the circumstances of the case, that the latter was his intention. The case seems to me to be distinguishable from that of *Cory* v. *Bristow* (2), and the judgment of the House of Lords appears to me abundantly to justify the distinction I am now drawing. There

(1) 3 E. & E. 383; 30 L. J. (M.C.) 74. (2) 1 C. P. D. 54; 2 App. Ca. 262.

is not here, as there was in the case of *Cory* v. *Bristow* (1), any exclusive occupation of land by the party rated of a permanent nature, such as can be the subject of rating. The other case, as it seems to me, does not substantially differ. There the owner, while certain houses were being rebuilt, permitted the use of the premises in much the same way, but, as it seems to us, he only intended to give a licence in the nature of an easement, as described in the case of *Watkins* v. *Overseers of Milton* (2), so to use them during the rebuilding, and not to part with the exclusive occupation of any part of the land. It may possibly be that the result of the use of the premises as described would be to enhance the value of the premises in the hands of the occupier, so that they would be of some value in respect of the amount produced by way of payment for the use of them for advertising purposes, instead of being of no value as unoccupied premises, and that in respect of such value the occupier might be rated. I am disposed to think it would be so. But it is not necessary to decide this point. The question for us is whether the appellant is rateable. It seems to us that he is not, and that the present case is distinguishable from all the cases that have been cited where there has been held to be a rateable occupation. It is not necessary to go through the cases. In the case of *Cory* v. *Bristow* (1), for instance, the very nature of the structure which the conservators allowed to be put up immediately distinguishes the case from the present. James, L.J., there says: "There is no dispute as to the general principle of law, viz., that where any part of the soil is permanently occupied by anybody for profitable purposes, as, for instance, where it is occupied by a company by means of its water or gas pipes or telegraph posts, then the person so occupying is rateable in respect of such occupation; but when a person has a mere right to use the land in the nature of an easement, and the occupation remains in somebody else, as, for example, in the case of a lodger, when the occupation remains in the lodging-house keeper, then such person is not liable to be rated." The other judges also took the same view. In such a case as that of the telegraph posts the occupation of the soil was obviously intended to be permanent, subject to a slight alteration of the position of

(1) 1 C. P. D. 54; 2 App. Ca. 262. (2) Law Rep. 3 Q. B. 350.

1877

THE QUEEN v. ST. PANCRAS ASSESSMENT COMMITTEE.

the posts if found inconvenient. I am not disposed to draw subtle distinctions between cases substantially identical, but we must, before we can come to a conclusion in favour of rateability, see that there is an occupation of a permanent character, and not a merely permissive licence to use the premises in the nature of an easement. In my opinion the owner of the premises in the present cases did not intend to part with the exclusive occupation of them. For these reasons I am of opinion that in neither of these cases was the appellant rateable.

LUSH, J. (1) The only question for us is whether Mr. Willing is rateable. I wish to be considered as expressing no opinion on the question whether the use of the premises as described could be considered as enhancing the rateable value of the premises in any other person's hands. The question we have to decide is, whether the appellant was an "occupier of land" within the meaning of the statute of Elizabeth.

It is not easy to give an accurate and exhaustive definition of the word "occupier." Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year.

On the other hand, a person who, without having any title, takes actual possession of a house or piece of land, whether by leave of the owner or against his will, is the occupier of it. Another element, however, besides actual possession of the land, is necessary to constitute the kind of occupation which the Act contemplates, and that is permanence. An itinerant showman who

(1) The learned judge stated that on the conclusion of the first day's argument, having heard the greater part of the arguments, he had looked into the authorities and had written a judgment provisionally, subject to any alteration which might be made in his opinion by the remainder of the arguments. Still continuing of the same opinion as expressed in the judgment he had prepared, he proceeded to deliver such judgment.

erects a temporary structure for his performances, may be in exclusive actual possession, and may, with strict grammatical propriety, be said to occupy the ground on which his structure is placed, but it is clear that he is not such an occupier as the statute intends. As the poor-rate is not made day by day or week by week, but for months in advance, it would be absurd to hold that a person, who comes into a parish with the intention to remain there a few days or a week only, incurs a liability to maintain the poor for the next six months. Thus a transient, temporary holding of land is not enough to make the holding rateable. It must be an occupation which has in it the character of permanence; a holding as a settler not as a wayfarer. These I take to be the essential elements of what is called a beneficial or rateable occupation, and to these tests we must revert in cases like the present, which seem to be on the borderland, and to present at first sight considerable difficulty. When the subject of occupation is not a surface area—which is the idea primarily suggested by the phrase "occupier of land"—but only a small portion of the soil, so much of it as contains a post, a pipe, or a rail, the element of permanence or its absence is shewn by the way in which the post, &c., is connected with the soil. I do not agree with Mr. Castle that the word "permanence" is used in this class of cases in the sense of being continuous as to its use, but I think it is used in the sense of being permanently attached to the ground as a fixture. It would be an abuse of language to say that the owner of a post lying upon the ground is thereby occupier of the ground upon which the post rests, however long it may be there; but if the post is inserted into the ground, or otherwise so attached to it that it cannot be severed from the land without breaking up the soil, it has become one with the soil, and the owner of the post is thereby occupier of the soil to which it is annexed.

This element pervades the cases of water-mains, gas-mains, telegraph posts, tramways, mooring posts, and other like cases, in all of which, where the rateable quality has been affirmed, the ruling idea is, that by the mode of attachment the chattel has been merged in the soil, so that by means of that which has been embedded in or fixed to the land the owner of it occupies the land itself. Tried by this test, which explains and reconciles the

1877

THE QUEEN v. ST. PANCRAS ASSESSMENT COMMITTEE.

cases cited in the argument, the appellant is not occupier of any land by means of the hoarding in the first case or the poles in the other. It is impossible to hold that any land was demised to Mr. Willing in either case. What he paid for was merely a licence to use the premises as he did. The distinction which the justices have made between the two cases cannot be maintained. In neither case has anything been so annexed to the soil as to become a fixture. In the second case, which is the stronger of the two, the poles are merely let into the ground in holes dug for the purpose, but they are not in any way attached to the soil, and may be removed without disturbing it. They are as much chattels as if they lay upon the ground instead of standing on it.

For these reasons I am of opinion that the order of sessions in the first case must be affirmed, and in the second quashed.

Judgment for the appellant.

Solicitor for appellant: *S. Edwards.*

Solicitors for respondents: *Cunliffe & Beaumont.*

June 29.

THE QUEEN ON THE PROSECUTION OF A. I. TILLYARD *v.* THE PRINCIPAL, FELLOWS, AND SCHOLARS OF HERTFORD COLLEGE, IN THE UNIVERSITY OF OXFORD.

Universities' Tests Act, 1871 (34 *Vict.* c. 26)—*New Endowment with Religious Test—Hertford College Act*, 1874 (37 *&* 38 *Vict. c.* 55).

By the Hertford College Act, 1874, Magdalen Hall, in the University of Oxford, was dissolved, Hertford College created, and the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship, restricted to members of specified churches, was afterwards accepted by Hertford College. A candidate having been refused examination for the fellowship, on the ground that he was not a member of any of the specified churches:—

Held, that a mandamus must issue commanding the college to examine the candidate, and to proceed to an election, for by the Universities Tests Act, 1871, Magdalen Hall, as a "college" subsisting at the passing of the Act, could not have accepted an endowment subject to such a restriction, and under the Hertford College Act, 1874, Hertford College stood in the same relation to the Universities Tests Act, 1871, as Magdalen Hall.

Held, also, that the fact that another candidate had been elected, and the office was full, did not affect the right to proceed by mandamus.

Revd on appl 16 B D 1913 CA.

MANDAMUS, directed to the principal, fellows, and scholars of Hertford College, Oxford, commanding them to examine the

prosecutor as a candidate for a vacant fellowship in the college. The defendants made a return to the mandamus, and to this return there was a demurrer.

The material facts upon the record are stated in the judgment of Mellor, J. The arguments appear in the judgments.

June 2 and 6. *Herschell, Q.C.*, and *R. S. Wright*, for the prosecutor.

Sir H. Giffard, S.G., Thesiger, Q.C., and *C. S. C. Bowen*, for the defendants.

Cur. adv. vult.

June 29. The following judgments were delivered:—

MELLOR, J. The question in this case arises upon a demurrer to a return to a writ of mandamus, which commanded the principal, fellows, and scholars of Hertford College, in the University of Oxford, that they should, by the governing body of the said college, without delay, examine one Alfred Isaac Tillyard, in such subjects as the said governing body should determine, as a candidate for a vacant fellowship in the said college, the election for which was advertised to be held on the 21st of December, 1875, and proceed to an election of a fellow pursuant to the statutes of the said college.

The important question raised by the facts set forth in the return, is, whether the governing body of Hertford College were justified in refusing to examine Mr. Tillyard, as a candidate for the fellowship, which was founded and endowed subsequently to the Hertford College Act, 1874, upon the terms and conditions that such foundation and endowment, "should be limited to members of the Church of England, or of Ireland, or of the Protestant Episcopal Churches of Scotland, the British Colonies, or the United States of America."

The facts relating to such fellowship were as follows:—On the 10th of April, 1875, a certain person made a gift and endowment, which was accepted by the said college on conditions which, so far as they are material, are above stated, which acceptance by the college had been duly sanctioned by the Chancellor of the University, in pursuance of the 7th section of the Hertford College Act, and the fellowship in question was provided and maintained

1877

THE QUEEN v. HERTFORD COLLEGE.

by means of such gift and endowment only. In the latter part of the year 1875, the governing body of Hertford College published an advertisement which, so far as is material, was as follows: "There will be an election in this college to one fellowship on Tuesday, December 21. Candidates must be members of the Church of England, or of Ireland, or of the Protestant Episcopal Churches of Scotland, the British Colonies, or the United States of America. They must have passed all the examinations for the degree of B.A. in the Universities of Oxford, Cambridge, or Dublin." Mr. Tillyard, who was a scholar of St. John's College, Cambridge, and 8th classic in the Tripos for the year 1875, and had passed all examinations required for the degree of B.A. in the University of Cambridge, but who was not a member of the Church of England, or of any of the other churches named in the said advertisement, but was a Nonconformist, presented himself to the governing body of Hertford College as a Nonconformist candidate, being advised, as he alleged, that the restriction as set forth in the advertisement, to members of the Church of England and the other churches named therein, was not in accordance with law, and requested to be allowed to compete for such fellowship, notwithstanding such restriction. He was, however, informed that the then approaching election to the fellowship would proceed on the terms of the advertisement; and he was informed by the principal that he might be examined if he desired it, but that he must understand that he would not be elected, even if he stood at the head of the list. I confess that I was surprised, on the argument of this case, to hear it gravely argued, as an answer to this mandamus, that the governing body had not refused to examine Mr. Tillyard; and further, that the principal had not authority to bind the college, or the governing body thereof, by his acts or words, or to refuse to admit Mr. Tillyard, or any other person, to be examined as a candidate for the same or any fellowship, and that Mr. Tillyard did not, except as aforesaid, tender, or present himself, at or for such examination, nor was examined as a candidate for the same. Considering the nature of the question intended to be raised by the mandamus, and the fact that in a letter of admitted authority, dated the 11th of December, 1875, he had been officially informed by the principal that the approaching election

to the fellowship would proceed on the terms of the advertisement, I regret to observe an attempt to set up, as an answer to the writ, that there had been no refusal to examine him. Now, inasmuch as it appears that Mr. Tillyard was a scholar of St. John's College, Cambridge, and 8th classic in the Tripos of that year, and had passed all his examinations for his B.A. degree, it would, I think, have been a better course, to have raised the important question at issue, without having recourse to such an objection. Moreover, I think that this objection, which was intended to allege that there had been no sufficient demand and refusal, is now too late, and ought to have been urged on shewing cause against the rule. It is certainly an idea which borders somewhat on the ludicrous, that Mr. Tillyard might have been examined simpliciter, had he chosen to be so. It is idle to suppose he wished or desired to be examined, *except as a candidate* for the fellowship in question, and it is clear upon the facts that no offer was made to him of any examination with that object. It was suggested upon the argument that the donor might withdraw his gift to the college, by which alone the fellowship could be pecuniarily supported. This consideration is, as it appears to me, wholly beside the question. The fellowship has been regularly established according to the statutes of the college, and with the sanction of the Chancellor of the University, and whether it will be fruitful in a pecuniary point of view or not is wholly immaterial.

Having thus referred to the introductory facts, I proceed to deal with the question of law, upon which the sufficiency of the return must depend.

It appears that before and down to the 28th of June, 1805, there existed a college called Hertford College, which on that day was dissolved, and thenceforth, down to the passing of the Hertford College Act, 1874, there existed a certain house kept open for the reception and education of students, called Magdalen Hall; and certain property, real and personal, formerly belonging to Hertford College, together with the site of the dissolved college, was by virtue of certain statutory powers transferred to the chancellor, master, and scholars of the university, in trust for the principal and other members of Magdalen Hall.

During the existence of Magdalen Hall, and before the passing

1877

THE QUEEN v. HERTFORD COLLEGE.

of the Hertford College Act, 1874, the Universities Tests Act, 1871, was passed by Parliament; and it is material to observe, that in the same year the 34 & 35 Vict. c. 63, entitled "An Act to amend the Law respecting the granting of Charters in certain Cases," also passed. (1)

The recital of the Universities Tests Act is as follows:— "Whereas it is expedient that the benefits of the Universities of Oxford, Cambridge, and Durham, and of the colleges and halls now subsisting therein as places of religion and learning should be rendered *freely accessible to the nation;* and by means of divers restrictions, tests, and disabilities, many of her Majesty's subjects are debarred from the full enjoyment of the same, and it is expedient that such restrictions and disabilities should be removed under proper safeguards for the maintenance of religious instruction and worship within the same."

Before examining the particular provisions, I would observe that, whilst this Act provided for the removal of tests in all existing foundations, the College Charter Act provided abundant security that in any grant for the foundation of any new college, or new university, the policy of parliament should not be silently reversed or affected. It was conceded in the argument, that as long as Magdalen Hall continued, it would have been governed by the Universities Tests Act, and that it was so governed until the passing of the Hertford College Act, 1874; but it was contended that, when Magdalen Hall was transformed into Hertford College, it was set free from the provisions of the Universities Tests Act, so that in the result Hertford College, being in point of law a new creation, by the effect of the Hertford College Act is freed from the provisions of the Universities Tests Act, and not being a new college established by a new charter under the provisions of the College Charter Act, is not prevented from accepting new endowments containing the same or similar "re-

(1) 34 & 35 Vict. c. 63 (The College Charter Act, 1871) enacts: "A copy of any application for a charter for the foundation of any college or university, which, after the passing of this Act, may be referred by her Majesty in Council for the consideration and report of any Committee of her Majesty's Privy Council, shall, together with a copy of the draft of the charter applied for, be laid before both Houses of Parliament for a period of not less than thirty days before any such report shall be submitted to her Majesty."

strictions, tests, and disabilities," which were swept away by the Universities Tests Act; and, indeed, it was contended that there was nothing in the state of the law to prevent new endowments so restricted being accepted even by colleges and halls which were in existence when the Universities Tests Act passed. Although it must be conceded that in point of law Hertford College became upon the dissolution of Magdalen College a new college, yet, in considering the effect of the saving clause (sect. 13) of the Hertford College Act, the fact that the dissolution of Magdalen Hall and the creation of Hertford College partook of the character of transformation must not be lost sight of, as affording a clue to the meaning of the saving clause of the Hertford College Act.

The Universities Tests Act, 1871, commences with an interpretation clause (sect. 2), and defines the word "office" to include, amongst others, every "fellowship, studentship, tutorship, scholarship, and exhibition, and also any office or emolument not in this section specified, the income of which is payable out of the revenues of any of the said universities, or of any college within the said universities, or which is held or enjoyed by any member as such of any of the said universities, or of any college within any of the said universities." The defendants desire to read this as one sentence, and to restrict its meaning to offices the income of which was then payable out of the revenues of any of the universities or of any college within the same. I cannot but think that such a confined interpretation is inconsistent with the object of that Act, and I think cannot have been contemplated by the legislature; and, if that restriction exists in the one class of persons, it must also apply to the class of persons enumerated in the section; and it is to be observed that the interpretation clause expressly includes tutorships and exhibitions, of which tutorships are frequently not paid out of the revenues of the university or college, and exhibitions, as far as I know, seldom.

Then comes the 3rd and important section, which provides that, after the passing of the said Act no person shall be required, upon taking a degree other than a degree in divinity, or to enable him to exercise the rights of graduates in the said universities, or in any college subsisting at the time of the passing of the Act, or upon taking or holding, or to enable him to take or hold, any

1877

THE QUEEN v. HERTFORD COLLEGE.

office in the said universities or any college within the same, "to subscribe any article or formulary of faith, or to make any declaration, or take any oath respecting his religious belief or profession, or to conform to any religious observance, or to attend or abstain from attending any form of public worship, or to belong to any specified church, sect, or denomination, nor shall any person be compelled, in any of the said universities or any such college as aforesaid, to attend the public worship of any church, sect, or denomination to which he does not belong." It is difficult to imagine words more clear and comprehensive than these words are, or better calculated to effect the admirable object of the legislature in rendering the universities as places of religion and learning "freely accessible to the nation."

It is not denied that Magdalen Hall, at the time of its transformation into Hertford College, was subject to all the provisions of the Universities Tests Act, but it is contended that the use of the words "now" and "now subsisting therein," and kindred expressions, shews that it was intended to be limited in its operation to the existing colleges and existing endowments. It appears to me that it could never have been intended by parliament that the repeal of the restrictions, tests, and disabilities effected by the Universities Tests Act, should be limited to existing colleges and existing endowments. Parliament must, I think, have considered that by virtue of that Act, and the College Charter Act, they had provided as well for existing colleges and endowments as for future colleges; and it appears to me that, so far as the Hertford College Act is concerned, such was manifestly the view of parliament at the time. It could not have been supposed that by the mere transformation of Magdalen Hall into Hertford College any release from the Universities Tests Act could be effected. By that Act, passed in 1874, Magdalen Hall was dissolved, and the Rev. Richard Michell, and divers other persons named or referred to in the recital to the Act, and the several persons who before the passing of that Act were scholars in Magdalen Hall, were incorporated under the name of the principal, fellows, and scholars of Hertford College in the University of Oxford; and by s. 3 it was enacted that all lands, messuages, and tenements and personal estate which had been theretofore held on any trusts for Magdalen

Hall should "immediately upon the passing of the Act vest absolutely in the principal, fellows, and scholars of Hertford College," and should "be held possessed and enjoyed by them" and their successors "for the same estates and under the same titles for and under which the same" were then held, &c.; and by s. 4, "all persons who immediately before the passing of" that Act "held any office of honour or emolument therein" should "immediately on the passing of" that Act "become the members of and holders of the like office in Hertford College" upon the like terms as if the said hall had continued to exist unaffected by that Act. That section is followed by s. 5, which was much relied on by the defendants in their arguments. By that section it was provided that, "subject to any Act for the time being in force for the government of the said university, or of the colleges therein," the principal and fellows for the time being of Hertford College might from time to time make, rescind, and vary such regulations, ordinances, and statutes for the government of the said college and the good discipline thereof, and the election of the fellows and scholars thereof, and it was provided that regulations were to have no effect until confirmed by the Chancellor of the University as visitor, and until they had received the approbation of her Majesty, signified by an order in council and laid before parliament, which was accordingly done. By s. 12, "all deeds, wills, instruments, purchases, sales, and contracts in which the principal and members of Magdalen Hall" were named should be as effectual "in favour of or against the principal, fellows, and scholars of Hertford" as if they had been named therein, or as if the words "Hertford College" had been inserted instead of "Magdalen Hall." By the 7th section of the same Act, which was also much relied on by the counsel for the defendants, it is enacted that, "the principal, fellows, and scholars may accept, hold, and enjoy such gifts and endowments as may be made to them for the endowment, improvement, establishment, or maintenance of the principalship, fellowships, &c., within the college, or for any other lawful purpose, upon such terms and conditions as may, with the sanction of the chancellor of the said university, be agreed on between them and the respective donors."

Now it was contended on the part of the prosecutor, that the

1877

THE QUEEN v. HERTFORD COLLEGE.

powers contained in s. 5 to make and to vary the regulations and ordinances therein referred to, although such statutes were to be confirmed by the chancellor and approved by her Majesty, were subordinate and subject to the Acts then in force, and especially to the Universities Tests Act, and that such section was confined to regulations and statutes for the ordinary government of the college, and could not extend to enable the governing body of Hertford College to make statutes inconsistent with the Universities Tests Act, and it was strongly urged that this was rendered clear by the concluding section of the Hertford College Act, which is as follows:—"Nothing in this Act contained shall be construed to repeal any of the provisions of the University Tests Act, 1871."

Although several subordinate objects were suggested for the insertion of this clause, none of them appeared to me to require such a provision for the carrying them out; and I cannot but think that, reading the clause in connection with the provisions of the Hertford College Act, and considering the objects sought to be attained thereby, namely, the transformation of Magdalen Hall into Hertford College, that it never could have been intended by parliament to enable the governing body of Hertford College, in its transformed condition, to take advantage of that fact to re-establish any restrictions, tests, or disabilities expressly repealed by the Universities Tests Act. Were it to be held otherwise, a new Universities Tests Act would soon become necessary in order to prevent, so far as possible, the benefits of the universities, colleges, and halls as places of religion and learning being rendered less "freely accessible to the nation." Reading the 7th section of the Hertford College Act in connection with the 5th section, which gives the power to the governing body to make statutes for the government of the college, it never was intended as I think to enable that body to accept gifts or endowments upon any terms and conditions inconsistent with the terms and conditions of the Universities Tests Act, 1871, and that all terms and conditions prescribed by any donor, having that effect are incapable of being carried out by the governing body of the college, and that the insertion in clause 17 of the college statutes of the words "so far as such provisions shall not be expressly modified by the terms on

which the endowments of such fellowships shall be accepted by the governing body," must be read as limited to terms which impose no restriction, test, or disability inconsistent with the provisions of the Universites Tests Act, 1871.

Inasmuch, therefore, as I think that Mr. Tillyard, although not being a member of any of the specified churches, but a Non-conformist, was not thereby rendered ineligible for examination and for election as a fellow if elected by the governing body, I think that there was a substantial refusal to examine Mr. Tillyard as a candidate for the fellowship, and that such refusal rendered the election which followed null.

It was further contended on the part of the defendants that the election which took place had made the office full, and there is, therefore, no ground for a writ of mandamus, but that the appropriate remedy, if there be any, is by quo warranto. I am, however, of opinion that this contention is erroneous, and that the answer cannot avail the defendants, but that, the election being null, a peremptory mandamus, in the terms prayed, will clear the office of the intruder, and remove all obstacles to the examination of the said Alfred Isaac Tillyard, and to the proceeding to a fresh election by the governing body.

LUSH, J. The first and the important question raised in this case is, whether a lay fellowship in Hertford College can be lawfully restricted to persons professing a specified religious creed, though it be a fellowship endowed subsequently to the creation of the college, upon the special condition that it shall be held only by persons professing that particular creed. This depends on the construction, first, of the Hertford College Act, 1874, and, secondly, of the Universities Tests Act, 1871; for I agree with the Solicitor-General that the Tests Act does not proprio vigore govern Hertford College. Although that college was constructed out of the dissolved Magdalen Hall, it is nevertheless a new creation; and, as the Tests Act, 1871, applies only to colleges then subsisting, the question whether the newly created college is subject to the provisions of that Act must depend upon the language and intent of the Act of 1874, by which Hertford College was created.

1877

THE QUEEN v. HERTFORD COLLEGE.

Sect. 3 of that Act vests all the property theretofore belonging to Magdalen Hall in the newly created college, which property, the Act proceeds to say, "shall thenceforth be held, possessed, and enjoyed for the same estates, and under the same titles, for and under which the same are now held, and upon the same trusts and for the same intents and purposes, and subject to the same rents, conditions, encumbrances (if any), powers and provisoes upon, for, and subject to which the same would now be held, if in the several instruments by virtue of which the same are now held respectively the name of Hertford College had been inserted instead of that of Magdalen Hall, or the principal, fellows, and scholars thereof, as the case may be, had been named instead of Magdalen Hall, or the principal and scholars thereof," &c.

It is admitted that Magdalen Hall, up to its dissolution, was subject to the provisions of the Universities Tests Act, 1871; and it cannot be doubted that, if Hertford College had been in existence when that Act was passed, instead of Magdalen Hall, the property would in 1874, when the Hertford College Act passed, have been held subject to that Act. So far, therefore, as the original endowments are concerned, Hertford College is, by this section, placed on the same footing as all the other colleges of the university.

Sect. 5 further carries out this principle. It says: "Subject to any Act for the time being in force for the government of the said university or of the colleges therein, the principal and fellows for the time being of the said college may, from time to time, make, rescind, and vary such regulations, ordinances, and statutes for the government of the said college, and the good discipline thereof, and the election of the fellows and scholars thereof, as to them shall seem meet: Provided that no such regulations, ordinances, or statutes shall alter the trusts, intents, purposes, conditions, powers, or provisoes mentioned in the 3rd section of this Act, or shall have any effect until the same shall have been confirmed by the Chancellor of the University as visitor of the college, and shall also have received the approbation of her Majesty, to be signified by an order in council, and forthwith published in the *London Gazette*, and shall have been laid before parliament." This section asserts twice over the supremacy of the Tests Act,

1871, over this college; first, by requiring its statutes to be made "subject," that is conformable, to the provisions of that Act; and, secondly, by prohibiting any alteration therein of the trusts, intents, purposes, and conditions, mentioned in the 3rd section—the one already quoted.

So far the intention of the legislature is clearly expressed, that Hertford College is to stand in the same relation to the Tests Act, 1871, as it would have stood if it had been a subsisting college when that Act passed.

The next section, and the one mainly relied on, is s. 7, which gives the new college capacity to accept fresh endowments. It enacts that "the principal, fellows, and scholars may from time to time accept, hold, and enjoy such gifts and endowments as may be made to them for the endowment, improvement, establishment, or maintenance of the principalship, fellowships, professorships, tutorships, lectureships, or scholarships, within the said college, or for any other lawful purpose, upon such terms and conditions as may, with the sanction of the chancellor of the said university, be agreed on between them and the respective donors." I am not aware whether this clause has any equivalent in the charters of the older colleges or not. It is in terms most comprehensive. There is no qualification or limitation of "the terms and conditions," which may be imposed by the donor, and accepted by the college; and, if the clause were to be read by itself, the governing body would be justified in carrying out the wish of the donor, and confining the fellowship in question to members of Episcopal churches. But the generality of the language of this section is controlled by s. 13, which overrides the whole Act, and the evident purpose of which was to exclude any supposition that the legislature intended Hertford College to be exempt from any restriction which the Tests Act imposed on all the other colleges. The words are, "nothing in this Act contained shall be construed to repeal any of the provisions of the University Tests Act, 1871." The Solicitor General endeavoured to limit the application of this latter section to some of the minor provisions of the Tests Act, but that construction does not exhaust the language of this section. It says, in effect, "You are to read this Act, and every word of it, in such a sense as shall not work a repeal of any part

1877

THE QUEEN v. HERTFORD COLLEGE.

of the Tests Act, 1871, quoad this college." In other words, all the provisions of the Tests Act, 1871, are to be understood as in force, and as governing this college as well as the other colleges of the university. This is the only meaning of which the words are susceptible.

It follows that the terms and conditions upon which new endowments may be accepted are such terms and conditions as are not repugnant to the Act of 1871. Hertford College is, therefore, placed in all respects, both as to old and new endowments, in the same position as the colleges which were subsisting when the Tests Act passed.

This opens up the larger question, whether in any of the colleges of the university new fellowships can be created which shall be open only to persons professing a given religious faith. The answer to this question will be found to rest entirely upon the true construction of s. 2 of the Act of 1871. The definition clause, s. 3 of that Act, prohibits the imposition of any religious test as a qualification for any office in the university or in any of the colleges. The language, so far as it deals with colleges, is "from and after the passing of this Act no person shall be required upon taking or holding, or to enable him to take or hold, any office in any college subsisting at the time of the passing of this Act, or upon teaching, or to enable him to teach, within any such college as aforesaid, to subscribe any article or formulary of faith, or to make any declaration, or to take any oath respecting his religious belief or profession, or to conform to any religious observance, or to attend, or abstain from attending, any form of public worship, or to belong to any specified church, sect, or denomination, nor shall any person be compelled in any such college as aforesaid, to attend the public worship of any church, sect, or denomination to which he does not belong." I pass by the proviso relating to clerical offices, as having no bearing on the present question. Hertford College is, as I have already shewn, placed in the same position as a college subsisting at the passing of the Act. What is to be deemed an "office" is thus defined by s. 2: "The word 'office' includes every professorship other than professorships of divinity, every assistant or deputy professorship, public readership, prælectorship, lectureship, headship of a college or hall, fellowship,

studentship, tutorship, scholarship, and exhibition, and also any office or endowment not in this section specified, the income of which is payable out of the revenues of any of the said universities, or of any college within the said universities, or which is held or enjoyed by any member as such, of any of the said universities, or of any college within any of the said universities." The contention on the part of the defendants is, that this clause is to be read as one entire sentence, and that the words, "the income of which is payable out of the revenues of any college," belong as well to the offices enumerated, as to those not specified; and, further, that the fellowship in question, being payable out of a fund specifically appropriated to a given class, is not payable out of the revenues of the college within the meaning of the clause. It is unnecessary to express any opinion upon the latter branch of the argument, because I am of opinion that this is not the true construction of the clause. First, the structure of the clause does not fairly admit of its being so read. The words "and also" at the end of the specified offices naturally mark the commencement of a new sentence. If that which follows the word "exhibition" had been intended as a continuation of the series, the appropriate words would have been "and every other office or emolument the income of which is payable out of the revenues of the college;" whereas the words denote something additional and distinct; and the words referring to the revenues of the college are put in as descriptive of the quality of the other offices as distinguished from the first series, and not of offices ejusdem generis with that series. Secondly, amongst "offices" enumerated in the first branch of the sentence are some which may or may not be payable out of the college funds, such as tutorships and exhibitions; and the concluding paragraph of the clause takes in an alternative class of "offices" not qualified by any connection with emolument. In all these the 3rd section equally applies. Thirdly, such a construction would be repugnant to the spirit and intent of the Act, because it would admit of a majority of the governing body being elected for their special religious opinions, and so pledged to the maintenance of a particular creed. This might be easily effected by creating either unpaid fellowships, or fellowships endowed from without, and with funds not passing through the hands of the college

1877

THE QUEEN v. HERTFORD COLLEGE.

authorities; whereas the Act declares its intention to be that religious tests should no longer exist, but that all the benefits of the universities and colleges should be freely accessible to all her Majesty's subjects. The purpose and intent of the Act thus explicitly declared cannot, I think, be satisfied without holding that every one of the specified offices, whensoever and howsoever created, other than those which are specially excepted, is to be open to all persons alike, without regard to their religious belief or profession.

I am, therefore, of opinion that the restriction of the fellowship in question to members of Episcopal churches was a violation of the Act of 1871, and that the election which was made under that restriction was illegal and void.

The next and only remaining question is, whether a mandamus will lie to compel the college to examine the applicant as a candidate for the vacant fellowship, and to proceed to the election of a fellow pursuant to the statutes of the college. These statutes I may observe are framed in conformity with the requirements of the Tests Act, 1871, and do not impose or authorize any religious test. Two objections to the writ were urged on behalf of the defendants: the first was, that the authorities of the college were willing to examine him, and that, as he refused to be examined, he is not qualified to be elected. The answer is, that he did not ask merely to be examined, but to be examined as a candidate; that is, to be admitted as a person eligible to the office. This the college refused. It would have been a useless procedure to submit to an examination which he was told would not have altered his status before the electing body. Nor does he by this writ ask to be elected. A mandamus to elect him clearly would not lie were he ever so well qualified, because the governing body have a discretion in the choice. Their duty is, in the language of the college statutes, "To elect such persons to be fellows as, after examination in such subjects as the governing body shall with reference to each vacancy determine, the governing body shall deem to be the most deserving to be fellows of the college, and best qualified to promote its interests as a place of religion, learning, and education." But this is a moral, not a legal, duty. It is presumed that the governing body will discharge it conscien-

1877

THE QUEEN v. HERTFORD COLLEGE.

tiously and with due regard to the principle of the Tests Act, 1871, but the Court cannot enforce it. We cannot control their choice, or dictate to them the election of this or that particular candidate. Had the applicant submitted to be examined, the issue would still have been the same, namely, was he, or was he not, ineligible to the office by reason of his not being a member of an Episcopal Church? Another objection taken to the writ was that the office is full, and therefore that the governing body cannot obey the writ. If the office of fellow of a college were the proper subject of a quo warranto this objection would be a good one, for in that case the appropriate remedy for trying the title and creating a vacancy would be a quo warranto. But such a proceeding is not applicable to the office of a fellow of a college: see *Rex* v. *Gregory*. (1) And where quo warranto does not lie a mandamus is the only remedy: *Reg.* v. *St. Martin-in-the-Fields*. (2) A return that the office is full would in the latter case be a bad return. The vacancy which in the one case is created by judgment of ouster is, in the other, created by a peremptory mandamus. Both these objections failing, a peremptory mandamus ought to issue, with costs.

Judgment for the prosecutor.

Solicitors for prosecutor: *Woollacott & Leonard.*
Solicitors for defendants: *Markby, Tarry, & Stewart.*

HUNT *v.* THE CITY OF LONDON REAL PROPERTY COMPANY, LIMITED.

Aug. 2.

Practice—Action commenced in Chancery Division—Application for New Trial—Divisional Court—Appellate Jurisdiction Act, 1876 (39 & 40 *Vict. c.* 59), *s.* 17—*Order XXXVI., Rule* 16; *Rules of Court, December*, 1876, *Order XXXIX., Rule* 1; *Order LVII. A., Rule* 1.

Where an action commenced in the Chancery Division is tried by jury before a judge of the Common Law Division, application to set aside the verdict, or for a new trial, cannot be made to a Divisional Court, but must be made to the judge before whom the case was tried.

Overruled by C. of App. 3 Q.B.D. 69, C.A.

THIS action, which was to try the title to a strip of land with a wall upon it, situate in the city of London, was commenced in

(1) 4 T. R. 240, n. (2) 17 Q. B. 149; 20 L. J. (Q.B.) 423.

1877

HUNT v. CITY OF LONDON REAL PROPERTY CO.

the Chancery Division, and the defendant having given notice to have it tried before a judge and jury, under Order XXXVI., Rule 3, it was set down in the general list of actions for trial in London (1), and was tried before Field, J., at the Trinity sittings in London, when a verdict was found for the plaintiff.

C. Bowen moved for an order nisi to set aside the verdict, or for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence.

[FIELD J. Have we, sitting as a Divisional Court, any jurisdiction to hear the application? *Warner* v. *Murdoch* (2) decides that where an action brought in the Chancery Division is ordered to be tried by jury it must go into the general list of actions for trial in Middlesex. Then the Appellate Jurisdiction Act, 1876, s. 17 (3), requires all proceedings in an action subsequent to the trial, so far as is practicable, to be taken before the judge before whom the trial took place. It is true that by the same section Divisional Courts may be held for the transaction of any business

(1) By Order XXXVI., Rule 16, the list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial without reference to the Division of the High Court to which such actions may be attached.

(2) 4 Ch. D. 750.

(3) By the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17, on and after December 1, 1876, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: Provided, nevertheless, that divisional courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a Divisional Court.

By the Rules of Court, December, 1876, Order XXXIX., Rule 1, where in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by jury, any application for a new trial shall be to a Divisional Court.

By Order LVII. A., Rule 1, the following proceedings and matters shall continue to be heard and determined before the Divisional Courts: — Appeals from Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division where the action has been tried with a jury.

which may be ordered by Rules of Court to be heard before a Divisional Court; but these rules, which have since been made, do not apply to actions brought in the Chancery Division.]

Sect. 17 requires such proceedings to be taken before the judge "so far as is practicable and convenient," and it cannot be convenient that an application for a new trial on the ground of misdirection should be made before the judge who tried the cause. Under s. 4 of the Judicature Act, 1875, no judge of the Court of Appeal is to sit as a judge on the hearing of an appeal from any judgment or order made by himself. And s. 46 of the Judicature Act, 1873, enacts that any judge of the High Court sitting elsewhere than in a Divisional Court, may reserve any case, or point in a case, to be argued before a Divisional Court; and that any Divisional Court of the High Court shall have power to hear and determine such case. Both these sections go to shew that it was not intended that an application in the nature of an appeal should be made to the judge who tried the cause.

KELLY, C.B. A Divisional Court like this has no power to hear the application. The only course to be adopted is to apply to the judge who tried the cause.

FIELD, J. I am of the same opinion. It must be remembered that in Chancery a single judge disposes of all proceedings in a cause down to final judgment. The object of the Judicature Acts and the Rules is in this respect to assimilate proceedings in the Common Law Divisions to those in the Chancery Division. If the case had been tried before a Vice-Chancellor, the application for a new trial must have been made to him. The present application can only be made to me, not as member of a Divisional Court, but as the judge who tried the cause.

Order refused.

Solicitors for defendants: *Tathams & Pym.*

1877
Jan. 24.

VERDIN, APPELLANT; WRAY AND ANOTHER, RESPONDENTS.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 253, *and Sch.* 2, *Rule* 69—*Election of Member of Local Board—Fabrication of Voting Paper—Penalty*—"*Party aggrieved*"—*Consent of Attorney General.*

At an election for a member of the local board at W., the appellant and M. were the only candidates; M. was declared to be elected, he having obtained ninety-four votes and the appellant eighty-nine. The appellant, without the consent of the Attorney General, preferred an information under the Public Health Act, 1875, Sch. 2, Rule 69, against the respondents, charging them with fabricating in part the voting paper of D., a person entitled to three votes at the election; but the justices dismissed it on the ground that the appellant was not a "party aggrieved" within the meaning of the Public Health Act, 1875, s. 253, and therefore that the consent of the Attorney General was requisite:—

Held, that the dismissal of the information was wrong, for the appellant was a party aggrieved within the meaning of that statute.

CASE stated by justices of the peace for Cheshire under 20 & 21 Vict. c. 43.

An information was preferred by the appellant against the respondents charging that the respondent Wray, on the 5th of April, 1876, at the township of Wharton, within the local board district of Winsford, did on the occasion of the election of a member for the Wharton ward of the local board district of Winsford, fabricate in part the voting paper of Anne Roylance Dudley, a person entitled to vote at the said election, contrary to the Public Health Act, 1875, and that the respondent Atherton was then and there present wilfully aiding and abetting Wray to do and commit the said offence.

At the hearing of the information, the respondent Wray admitted the offence, but the respondent Atherton pleaded not guilty. The solicitor for the appellant then stated the case, which he proposed to make out before the justices, and which was to the following effect.

At an election for a member of the local board for the district of Winsford, the appellant and J. Moss were the only candidates in the Wharton ward, and a voting paper was duly delivered at the house of Anne Roylance Dudley, who was entitled to three votes at such election, and the voting paper was returned to the

returning officer with the name of Anne Roylance Dudley subscribed thereto, and the initials of A. R. D. marked against the name of J. Moss; and the result of the voting was that Moss had ninety-four votes and the appellant eighty-nine votes, and Moss was declared elected.

The appellant's solicitor further stated that he should prove that the name and initials of Anne Roylance Dudley were written by the respondent Wray without her authority, and that the respondent Atherton aided and abetted him therein.

At the close of the statement by the solicitor for the appellant, it was objected by the solicitor for the respondent Atherton that the information was invalid, inasmuch as the information and proceedings were not taken as required by s. 253 of the Public Health Act, 1875, (1) by a party aggrieved or by the local authority, but that they were taken by the appellant, who was not a party aggrieved, and without the consent of the Attorney General. The respondents' solicitor cited *Boyce* v. *Higgins* (2), *Hollis* v. *Marshall* (3), and *Reg.* v. *Blanshard.* (4)

It was contended on behalf of the appellant that he was a party aggrieved as being a candidate at the election, and that no consent of the Attorney General was required.

The justices considered that the appellant was not a party aggrieved within the meaning of the 253rd section of the Public Health Act, 1875, and that he could not under that section proceed without having first obtained the consent in writing of the Attorney General; they accordingly dismissed the information against both the defendants.

The question of law for the opinion of the Court was whether the appellant being a candidate at the election was a party

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney General."

By schedule 2, rule 69: "Any person who fabricates in whole or in part . . . any voting paper . . . shall be liable to a penalty not exceeding 20*l.*, or, in the discretion of the court, to imprisonment with or without hard labour for any period not exceeding three months."

(2) 14 C. B. 1; 23 L. J. (C.P.) 5.

(3) 2 H. & N. 755; 27 L. J. (Ex.) 235.

(4) 30 J. P. 280.

(2) 5 C.B. 18 Jur. 333

1877

VERDIN v. WRAY.

aggrieved within the meaning of s. 253 of the Public Health Act, 1875, and whether the information was rightly dismissed.

Gye, for the appellant. The decision of the justices was wrong; for the appellant was a "party aggrieved" within the meaning of the Public Health Act, 1875, s. 253. The respondent may rely upon *Boyce* v. *Higgins* (1); *Hollis* v. *Marshall* (2); *Rochfort* v. *Atherley* (3); but these cases are all distinguishable upon their facts. As the appellant was a candidate, he was aggrieved by the commission of any unlawful act tending to increase the number of votes appearing to be given against him.

Tickell, for the respondent Atherton. *Hollis* v. *Marshall* (2) shews that the circumstance of being a candidate does not render the appellant a "party aggrieved" within the meaning of the Public Health Act, 1875, s. 253. The offence charged is the fabrication of the voting paper, and the "party aggrieved" is the person whose vote was fabricated. Here the fabrication of the vote was too remote an injury to the appellant to allow him to be the prosecutor without the consent of the Attorney General; the immediate injury to the appellant was the use of the voting paper; and however improper an act that might be, the respondents were not charged with it in the information. So far as appears from the case, A. R. Dudley might have voted for Moss, and in that event the appellant clearly could not have been aggrieved.

Gye was not called upon to reply.

MELLOR, J. We do not require any further argument against the dismissal of the information; we are agreed that the appellant was a "party aggrieved." The construction adopted by the justices was too narrow.

LUSH, J. I am of opinion the appellant was a party aggrieved. The person whose vote was fabricated might have voted for the appellant, who might in that case have been returned. I think that a candidate at an election is aggrieved by the mere fabrication of a voting paper, whether or not the fabricated voting

(1) 14 C. B. 1; 23 L. J. (C.P.) 5. (2) 2 H. & N. 755; 27 L. J. (Ex.) 235.
(3) 1 Ex. D. 511.

paper can have any influence on the return of the candidates at the election. The case must be remitted to the justices with an intimation that the appellant was a party aggrieved, and that upon the facts stated the information was wrongly dismissed.

1877

VERDIN v. WRAY.

Case remitted.

Solicitors for appellant: *C. R. & H. Cuff.*
Solicitor for respondents: *H. Tyrrell, for E. Tennant, Hanley.*

COLE, APPELLANT; MANNING, RESPONDENT.

Jan. 31.

Bastardy—Corroboration of Mother—"Material Particular"—Evidence of Acts of Familiarity before the Time when the Child could have been begotten—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

Upon the hearing of a complaint in bastardy, the statement of the mother as to the paternity of the child may be sufficiently corroborated by the evidence of acts of familiarity between her and the defendant, although these acts have taken place at a time before the child could have been begotten; for evidence of this kind is a corroboration of the mother "in some material particular" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 4.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellant against the respondent under the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3 (1), charging that the respondent was the

(1) By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3, "any single woman . . . who may be delivered of a bastard child after the passing of this Act may . . . at any time within twelve months from the birth of such child . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child . . . and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

Sect. 4. "After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evi-

1877

COLE v. MANNING.

father of a bastard child of the appellant, born within the twelve months next preceding the date of the complaint.

At the hearing it was proved that the appellant had been delivered of a bastard child on the 10th of October, 1875, and the appellant swore that the respondent was the father, the connection having taken place at the respondent's house, where he had taken her on an evening in January, 1875. Of that meeting and that intercourse there was no corroborative evidence, nor was the magistrate satisfied with such evidence as was adduced as to subsequent conversations between the friends of the appellant and the respondent. But it was proved to the magistrate's entire satisfaction that during the summer of 1874, several months before the child could have been begotten, the parents of the appellant, with whom previously to that date the respondent had been on terms of great friendship and intimacy, refused him the house, and quarrelled with him, owing to their suspicions with regard to his conduct towards the appellant; they deposed that they surprised the appellant and respondent together on more than one occasion; that the door of the parlour where they were was closed for a minute or two against them; that the appellant sat on the knee of the respondent; and they deposed to other circumstances which would have had great effect on the magistrate's judgment had they occurred at or about the time when the child might have been begotten. The appellant was rather of weak intellect, but there was no evidence of any similar misconduct on her part with other men than the respondent.

After taking time to consider, the magistrate was of opinion that he was not at liberty so to interpret the words of the statute "if the evidence of the mother be corroborated in some material particular" (35 & 36 Vict. c. 65, s. 4) as to include evidence of facts long antecedent, and having no direct relation to the actual begetting of the child, however strong might be the moral conviction that such facts might convey to his mind, but that the

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dence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child."

word "material" must be taken to imply a closer connection of the "particular" in question than was in this case apparent with occurrences at or about the time when the child must have been begotten, or with subsequent words or actions of the respondent tending to fix the paternity.

The complaint was therefore dismissed.

Spearman (*Safford* with him) for the appellant. The question, whether a complainant in bastardy has been corroborated, is one of fact, and is to be decided by the magistrate in his discretion: *Reg.* v. *Pearcy* (1); *Lawrence* v. *Ingmire* (2); and it was held, under the repealed enactments of 7 & 8 Vict. c. 101, ss. 2 and 3, that the mother need not be corroborated as to the payment of money by the alleged father, where the summons was not taken out until after twelve months from the child's birth: *Hodges* v. *Bennett* (3); although proof of payment was essential to the jurisdiction of the justices.

J. Thompson was called upon to argue for the respondent. In order that the mother may be corroborated "in some material particular," as required by the Bastardy Laws Amendment Act, 1872, s. 4, she must adduce evidence directly confirming her statement as to the act of sexual intercourse which has led to the birth of the child: it would be dangerous to allow acts of familiarity unconnected with that intercourse to be admitted as the corroboration rendered necessary by the statute.

MELLOR, J. I think that the magistrate was mistaken in his decision: he ought to have received the evidence as a sufficient corroboration in point of law, and to have considered what weight was due to it in point of fact; and he in effect states that he would have found for the complainant if he had believed himself at liberty to admit it. No rule of law excludes testimony as to acts of familiarity before the time when the bastard child could have been begotten; and evidence of that kind shews at least a probability that the statement of the mother is true. Although the corroborative evidence related to the summer of 1874, and the intercourse resulting in the birth of the child did not take

(1) 17 Q. B. 902, n. (2) 20 L. T. (N.S.) 391.
(3) 5 H. & N. 625; 29 L. J. (M.C.) 224.

1877

COLE v. MANNING.

place until January, 1875, yet the magistrate was bound to act upon that evidence if he was satisfied as to its truth.

FIELD, J. I am of opinion that the case must be remitted to the magistrate to be heard and determined by him. He was quite at liberty to entertain the evidence as to what took place between the appellant and the respondent in the summer of 1874. The object of the bastardy laws was to give a woman the right to have her illegitimate child maintained by the father thereof: but, in order to prevent the danger which would arise if the statement of the mother were admitted without confirmation, the legislature has rendered it necessary that her evidence shall be corroborated "in some material particular;" and this is, no doubt, a proper precaution, as the sexual intercourse almost invariably takes place without the knowledge of other persons. It cannot be doubted that the testimony of the appellant's parents would have been material if it had related to events occurring at a later time, that is to say, in the month of January, 1875. The appellant is of weak intellect, and therefore less able to take care of herself: her parents found that the respondent would very likely take advantage of her, and they forbade him their house. The magistrate says that the acts of familiarity deposed to by the appellant's parents would have had a great effect upon his judgment, if he had considered himself at liberty to take them into consideration as corroborative evidence. I know of no rule of law which prevented him from so doing. Suppose that in the summer of 1874 the appellant and the respondent had been seen walking together in a lonely spot, such as might be convenient for the commission of immoral acts: certainly that would be a material corroboration of the appellant's evidence as to the paternity of her illegitimate child; and I do not think that the testimony rejected by the magistrate is distinguishable in principle. I am clearly of opinion that the evidence given by the appellant's parents did corroborate her statement in a material particular.

Case remitted.

Solicitors for appellant: *Cordwell & Tasman.*
Solicitors for respondent: *Hicklin & Washington.*

SPURR *v.* HALL AND ANOTHER.

1877
July 16.

Supreme Court of Judicature Act, 1875, *Order XXVII., Rule* 1; *Order XXX., Rule* 1—*Pleading—Embarrassing Defence—Payment into Court and Denial of Plaintiff's Right to sue pleaded to same part of Statement of Claim—Action for Nuisance raising Question of Title.*

The Supreme Court of Judicature Act, 1875, Order XXX., Rule 1, does not permit a defendant in an action for nuisance, raising a question of title, to plead payment into court and to deny the plaintiff's right of action in respect of the same part of the statement of claim; and if he so pleads, the statement of defence will be amended as embarrassing under Order XXVII., Rule 1.

Quære, whether in any kind of action the defendant can in respect of the same portion of the statement of claim pay money into court and deny the plaintiff's right to sue?

THE writ was issued on the 5th of February, 1877.

Statement of claim:—

3. The plaintiff was the owner of a dwelling-house used as offices by himself and by other persons, who were his tenants thereof.

4. On the west side of the house the plaintiff had a large fan-light over a door in the house, through which fan-light the plaintiff was entitled to have the light enter into his house.

5. The plaintiff had also a window admitting light into an office on the west side of the house, such window being over the fan-light above mentioned, and through this window the plaintiff was entitled to have the light enter into his house.

5a. On the south side of the house the plaintiff had five windows through which he was entitled to have the light enter into his house.

6. The plaintiff had also a cottage and outbuildings behind the house.

7. The plaintiff had a waterspout affixed to the cottage, which was joined to and connected with a waterspout belonging to the owners of the buildings adjoining the cottage, and the rain-water that fell on the roof of the cottage was carried off the roof by means of the waterspouts so joined and connected.

8. The plaintiff was entitled to have the rain-water that from time to time naturally fell on the roof drop and flow from the

1877

SPURR v. HALL.

waterspout of the plaintiff affixed to his cottage into and through the waterspout belonging to the owners of the buildings adjoining the cottage, and so on to the land of the plaintiff.

9. The defendants before the commencement of this action erected and still kept erected a large building near to the plaintiff's house and cottage on the west side thereof, and so high that the access of light to the plaintiff's house through the fan-light and window on the west side of his house, and through the five windows on the south side, had been greatly obstructed, and the house been rendered dark and of less value, and permanently injured.

10. The defendants in erecting the building adjoining the plaintiff's house and cottage so wrongfully, negligently, and carelessly erected the same, that they caused a large quantity of water to run on to and through the walls, plaster, and wood and other work of the cottage, so that the same became greatly and permanently injured thereby.

11. The defendants in erecting the building wrongfully carried away and removed part of the waterspout of the plaintiff affixed to the plaintiff's cottage, and disconnected it from other part of the same spout, and also from the waterspout of the owners of the buildings adjoining the cottage, and removed the waterspout of the owners of the buildings adjoining the cottage, so that the rain-water from the roof of the plaintiff's cottage ran down the walls thereof, and thereby greatly injured the cottage.

12. The defendants also wrongfully broke and removed a stone in the wall of the plaintiff's house upon which a door protecting the plaintiff's house rested.

The plaintiff claimed as damages 1500*l.*

Defence:—

2. As to the 3rd and 6th paragraphs of the claim, the defendants admit that the plaintiff at the times of the alleged grievances occupied certain rooms in the dwelling-house in the 3rd paragraph mentioned: but, save as aforesaid, the defendants deny the 3rd and 6th paragraphs, and they deny that the persons in the 3rd paragraph described as tenants were the plaintiff's tenants, and they say that the plaintiff is not entitled to the reversion of the dwelling-house, and is not entitled to sue for permanent injury to

the dwelling-house, cottage, and out-buildings, or for any injury thereto or to any part thereof, or for any injury not affecting his interest in the rooms occupied by him.

3. As to the 4th paragraph of the claim, the defendants admit that on the west side of the dwelling-house in the claim mentioned there was a fan-light over the door 2 ft. 10 in. long by 1 ft. 7 in. deep, but they do not admit the residue of the 4th paragraph.

4. As to the 5th paragraph of the claim, the defendants say that if there ever was a window over the fan-light, which they do not admit, it was not of greater depth than 5 ft. 6 in., nor of greater breadth than 3 ft. 6 in., and the same had for a long time before the opening out of the same, as hereinafter mentioned, been closed up by a permanent obstruction, so that no light could or did enter through the same. Shortly before the time when the defendants commenced the erection of the building hereinafter mentioned, and after the plaintiff had notice that the works were about to be commenced, the plaintiff caused the window to be opened out. Save as aforesaid, the defendants do not admit the 5th paragraph, and they do not admit that the plaintiff ever was entitled to have light enter into the said house, as alleged in that paragraph; and if he ever was so entitled, the defendants say that the plaintiff had ceased to be so entitled before the time of the alleged grievances, and was not so entitled at the time of the alleged grievances.

4a. As to paragraph 5a, the defendants do not admit that the plaintiff had five windows on the south side of the house; and the defendants deny that the plaintiff was entitled to have light enter into the house, as is in that paragraph alleged.

5. As to the 7th and 8th paragraphs of the claim, the defendants say that on the west side of the dwelling-house, cottage, and out-buildings in the claim mentioned there was a party wall which belonged to the owners of the dwelling-house, cottage, and out-buildings, and to the owners of the premises adjoining, as tenants in common, and the waterspout alleged to be affixed to the cottage was affixed to the party wall, and was the property of the owners of the cottage and of the owners of the adjoining premises, as tenants in common; and, save as aforesaid, the defendants do not admit the 7th and 8th paragraphs of the claim.

6. As to the 9th paragraph of the claim, the defendants admit

1877

SPURR v. HALL.

that before the commencement of this action they, as the servants of the Commissioners of Her Majesty's Works and Public Buildings, who were the owners of the aforesaid premises adjoining the dwelling-house, cottage, and out-buildings in the claim mentioned, erected a building on the adjoining premises on the west side of the dwelling-house. Save as aforesaid, the defendants deny the said paragraph. The defendants further say that the access of light to the dwelling-house has not been obstructed, and has not been so obstructed as to cause any injury to the plaintiff or to his interest in the dwelling-house.

7. As to the 10th and 11th paragraphs of the claim, the defendants say that they did, as the servants of and by the direction of the commissioners, in the course of erecting the building on the adjoining premises, place and suffer to remain for a short space of time certain boards on the top of the party wall, and that they did, as the servants of and by the direction of the commissioners, remove the waterspout with the intention of replacing the same. The defendants further say that, soon after the removal of the waterspout, they put up a new waterspout to catch the rain from the cottage, and the new waterspout carries the rain from the roof of the cottage in as effectual a manner as the old waterspout did. Save as aforesaid, the defendants deny the 10th and 11th paragraphs, and they deny that they acted wrongfully, negligently, or carelessly, as alleged.

8. As to the 12th paragraph of the claim, the defendants say that the said stone was a stone in the party wall, and the defendants, as the servants and by the orders of the commissioners, removed a portion of the stone. The removal of the portion of the stone caused no injury to the wall. The plaintiff had no right to have the door rest on the stone, and the door was not the plaintiff's door.

9. The defendants have paid into court 20*l.*, and they say that if any damage has been suffered by the plaintiff by reason of any of the acts complained of in respect of matters for which the plaintiff has any right of action against the defendants, the said sum is sufficient to satisfy the claim of the plaintiff in respect thereof.

The plaintiff applied to a master, amongst other remedies, for

an order that the defendants should amend the statement of defence, on the ground that it was embarrassing: the master made an alteration in the terms of paragraph 9 (as hereafter mentioned in the judgment), which, however, left it still pleaded as to matter covered by the other pleadings; but he refused to make the order prayed for. The plaintiff appealed to Lush, J., who referred the matter to the Court.

The plaintiff gave notice of motion that paragraph 9 of the statement of defence might be amended by specifying the cause or causes of action in respect of which the payment was made, or that so much of the defence as denied the allegations in the statement of claim might be struck out as embarrassing. (1)

May 15. *Dodd*, for the plaintiff, in support of the motion. The defence of payment into court cannot be allowed together with traverses of the cause of action. It was never intended by the new rules that the old practice should be altered in this respect. It is most embarrassing to allow the denial of a right to be pleaded together with payment into court. Actions such as the present are frequently brought to try a right, and not for substantial damages: but it would be impossible to try the right upon pleadings like these, for the plaintiff could not safely proceed in the face of the payment into court, and yet the traverses of the right would remain undisposed of. Again, in the case of an action for slander or libel which may be brought to clear a person's character and not for damages, it would be most unjust to allow the defendant to assess the compensation without permitting the plaintiff to clear his character: suppose a justification is pleaded together with payment into court; if the plaintiff takes the money out of court, he must leave the plea of justification standing on the record. The rules plainly contemplate that the cause of action with regard to which the money is paid in should be clearly specified, and that there should be an admission of the right to sue with regard to such cause of action. It is submitted that it is at least doubtful whether damages could be assessed in this action on the footing of a permanent destruction of the right.

(1) The notice contained other grounds of motion, to which it is unnecessary to allude.

1877

SPURR v. HALL.

[He cited *Battishill* v. *Reed* (1); *Fetter* v. *Beale* (2); *Rosewell* v. *Prior* (3); *Holmes* v. *Wilson* (4); *Shadwell* v. *Hutchinson*. (5)]

Gainsford Bruce, for the defendants. The old practice is altogether inapplicable to the present system of pleading. There are now no separate issues on the record. The pleadings are mere statements of facts. There is nothing embarrassing in the mode of pleading here adopted. The defendants in effect say, "If the plaintiff is satisfied with 20*l.* we are ready to pay that, but if he wants more, then we would rather fight." There is nothing unreasonable or inconvenient in their being allowed to do so. Either the sum offered is enough or it is not: if it is not enough, the plaintiff can safely refuse to take it out of court: if it is, there is an end of the action.

[He cited *Potter* v. *Home and Colonial Insurance Co.* (6)]

Cur. adv. vult.

July 16. The judgment of the Court (Mellor and Field, JJ.) was delivered by

FIELD, J. This case raises a question of very general importance, viz., whether, in an action for nuisance brought since the coming into operation of the Supreme Court of Judicature Act, 1875, payment into court can be pleaded in answer to the same causes of action, as to which a denial of the plaintiff's right of action is also pleaded. The action is brought for three things: first, for permanent damage caused to the plaintiff's reversion by interfering with light; secondly, for interfering with a waterspout; and, thirdly, for taking away a stone from a wall belonging to the plaintiff. The defendants have pleaded, denying the plaintiff's right to sue as reversioner, denying that the dwelling-house in question is interfered with, denying the right to light, and denying that the plaintiff has been injured either by the interference with the waterspout or by the removal of the stone. All these defences the defendants have a perfect right to put on the record together, but they have also pleaded in the following words:—[The learned

(1) 18 C. B. 696; 25 L. J. (C.P.) 290.
(2) 1 Salk. 11.
(3) 2 Salk. 460.
(4) 10 A. & E. 503.
(5) 4 Car. & Pa. 333; 2 B. & Ad. 97.
(6) Not reported.

judge read the 9th paragraph of the statement of defence]. The result, therefore, is that the defendants have paid 20*l.* into court in respect of the same causes of action as those the existence of which they deny. The plaintiff took out a summons for various remedies, including an application to strike out the defence, if it was not apportioned so as not to refer the payment into court to causes of action the existence of which the defendants deny. The master amended the defence, altering it to the following:—

"9. The defendants have paid into court 20*l.*, and they say that if any damage has been suffered by the plaintiff by reason of any of the acts complained of in respect of any of the matters alleged in the statement of claim, the said sum is sufficient to satisfy the claim of the plaintiff in respect thereof."

Upon this the plaintiff appealed by summons, which was heard before Lush, J., who referred to the Court the question, whether payment into court should be allowed to be pleaded together with a denial of the plaintiff's right of action.

In the first place the pleadings are clearly inconsistent, but ever since the statute enabling several pleas to be pleaded together (4 & 5 Anne, c. 16, s. 4) it has been held to be no cause for objecting to pleas that they are inconsistent with each other, and such pleas have been habitually pleaded together. But this permission has never been extended to pleas of payment into court which stand upon a different footing. Before the Judicature Acts (except in certain instances specified in the Common Law Procedure Act, 1852, s. 84), leave was wanted to plead several pleas together, and payment into court was never permitted to be pleaded together with any other plea to the same cause of action. The question before us now is whether any change has been introduced as to this by the Judicature Acts. Under those Acts no leave to plead several defences together is wanted, and the only remedy which the plaintiff has where defences are improperly joined is to apply under Order XXVII., Rule 1. (1) [The learned judge read it.]

(1) By the Supreme Court of Judicature Act, 1875, Order XXVII, Rule 1: "The Court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the

1877

SPURR v. HALL.

The question which we have to decide is whether pleading payment into court in such an action and in such a form as the present, covering as the paragraph does the causes of action denied by the previous paragraphs, tends "to prejudice, embarrass, or delay the fair trial of the action." It was argued for the defendants that it would be convenient that they should be allowed to pay money into court without admitting the plaintiff's right of action. It was said that the action is brought by the plaintiff to recover money, and the defendants ought to be able, if they so wish, to let him take the money he claims without at the same time being obliged to admit his right, and the defendants claim to be entitled to plead payment into court in this way under Order XXX., Rule 1. (1)

But that rule is controlled by the other rules in the same order, and a defendant cannot pay into court under Rule 1 in this form, under such circumstances as would render the provisions of Rule 4 inoperative. The only authority which was cited for the defendants was *Potter* v. *The Home and Colonial Insurance Co.* (2), a case which was afterwards tried before me, where the Court of Appeal allowed the defendants to plead unseaworthiness and payment into court. The case was not argued on that point, but still if it had been exactly similar in its circumstances

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fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

(1) By the Supreme Court of Judicature Act, 1875, Order XXX., Rule 1: "Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a judge at any later time, pay into court a sum of money by way of satisfaction or amends. Payment into court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein."

Rule 4: "The plaintiff, if payment into court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered, then may before reply accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B.) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed."

(2) Not reported.

1877

SPURR v. HALL.

to the present case, it would be an authority for allowing the defence to be pleaded. But the present case is very different, and is an action of a peculiar character, and having peculiar consequences. It is in its main intent and purview an action of nuisance which was originally introduced in substitution for an old writ, by which the nuisance could be abated. (1) Now, in actions for nuisance damages up to the commencement of the action only can be recovered, and not damages for injury to the saleable value of the property (2); and the consequence of allowing the two defences to stand together would be this. It is probable, looking to the circumstances of the case, that the plaintiff would be advised to take the 20*l.* out of court, and then a difficulty would arise. If he had established his right upon a traverse of the defendants' pleading in bar, he would have been entitled to bring a fresh action for any further damage done, and it is clearly established that in that new action he would be entitled to recover exemplary and vindictive damages, for if it were otherwise, as has been said, the wrong-doer could forcibly purchase the property to which the injury was done. But how is the plaintiff, in the present action, if he wishes to exercise his rights under Rule 4 by taking the 20*l.* in satisfaction, to deal with the defences denying his right of action? If he admits those allegations, there is this anomaly, that he would admit he had no right, and yet recover damages for breach of his right; and, as to costs, instead of taxing his whole costs and bringing a new action, he would probably have to pay the costs of all the other issues. Again, what would happen with his new action? In that action the defendants would pay into court perhaps 5*l.*, and go on in the same way as often as the plaintiff sued them, until at last, when the witnesses are dead, and the means of proving the case are lost, the defendants could defeat the plaintiff without offering any satisfaction by denying his right and putting him to the proof of it. We think that if acts have been done by a defendant which amount to an assertion of ownership, or inflict injury on the plaintiff's property, and the defendant is sued, he must say whether he denies the plaintiff's right or admits it, and

(1) See 3 Bl. Com. ch. 13, p. 220.

(2) See *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. (C.P.) 290.

1877

SPURR v. HALL.

must plead in such a manner that the plaintiff if he succeeds in proving his right may be enabled in a second action to claim substantial damages in the event of any new injury. The order will therefore be that the 9th paragraph of the statement of defence be struck out, and the sum of 20*l.* be returned to the defendants, unless they elect within forty-eight hours to amend their pleadings so that the defence of payment into court shall not cover any of the causes of action which are denied. The defendants must pay the costs of the application both to this Division and at chambers.

Order absolute.

Solicitor for plaintiff: *J. L. Morris, for M. B. Spurr, Hull.*

Solicitors for defendants: *Collyer-Bristow, Withers, & Russell, for Roberts & Leak, Hull.*

March 22.

FRASER & CO. *v.* BURROWS.

Practice—Discovery—Affidavit of Documents—Action upon Marine Policy—Stay of Proceedings until Affidavit has been made by a person not party to the Action and not within Jurisdiction.

8 QBD 149

In an action upon a policy of marine insurance the defendant is not entitled to have the proceedings stayed until the plaintiff has obtained an affidavit of documents from a person, who is not a party to the action and is not within the jurisdiction of the Court and is not under the plaintiff's control; and it is not material that the plaintiff derives his title to the subject-matter of insurance through the person from whom the affidavit is sought.

THE plaintiffs were insurance brokers, and effected a policy on a cargo of oats on board the *Speedwell*, on a voyage from Prince Edward's Island to a port of discharge in the United Kingdom. The plaintiffs acted as agents for Hindman, who was the owner of the vessel and her cargo. The defendant underwrote the policy for 100*l.* After the policy was effected, the cargo was sold to Hurrell, the real plaintiff in the present action. The vessel started upon the insured voyage, and after the sale she was stove in by ice and was run ashore. The cargo was sold at a loss. Hindman was still in Prince Edward's Island.

Cleasby, B., made an order staying proceedings until the plaintiffs should produce an affidavit by Hindman of the ship's papers

1877

FRASER v. BURROWS.

and other documents in Hindman's possession. The plaintiffs moved by way of appeal from the order of Cleasby, B.

C. P. Butt, Q.C., in support of the motion. The order of Cleasby, B., cannot be sustained. The plaintiffs have no power to compel Hindman, who is out of the jurisdiction of this Court, to make an affidavit. The effect of the order will be to stay the action for an indefinite time, and in the meantime the real plaintiff, Hurrell, will be prevented from recovering the money due to him on the policy.

J. C. Mathew, in support of the order. Hindman was the principal, for whose benefit the contract of insurance was originally entered into; and the only title to sue of Hurrell, the real plaintiff in this action, is derived through Hindman; this order would have been valid as against him if the action had been brought for his benefit; and it is likewise valid as against Hurrell, who is only Hindman's assignee, and therefore stands in the same position as he does both at law and in equity. It is clear that such an order as this would have been valid before the Judicature Acts, if Hindman had resided in England: *Daniel* v. *Bond* (1); *Rayner* v. *Ritson* (2); and these statutes have not lessened the power to compel discovery. There is, perhaps, no authority exactly in point for sustaining the order; but it is clear upon principle that it was rightly made. The documents, as to which discovery is sought, may disclose a complete answer to any action upon the policy by Hindman, and can a policy void in its inception become enforceable in the hands of an assignee of the interest therein? Suppose that the insurance was obtained by misrepresentation; is Hurrell to be allowed to sue upon it, when Hindman could have maintained no action upon it? At all events the action ought to be stayed, until it has been shewn that application has been made to Hindman for an affidavit and that he has refused to make it.

Butt, Q.C., in reply. The order of Cleasby, B., cannot be upheld under the Supreme Court of Judicature Act, 1875, Order XXXI., Rules 11 to 18, for they refer only to documents in the possession of a party to the action.

KELLY, C.B. It does not appear that there has been any fraud

(1) 9 C. B. (N.S.) 716. (2) 6 B. & S. 888; 35 L. J. (Q.B.) 59.

1877

FRASER v. BURROWS.

on the part of either the nominal plaintiffs or the real plaintiff. The order stays the action until they shall have done something which it is in effect impossible for them to do. This order could not have been maintained before the Judicature Acts, and s. 21 of the Supreme Court of Judicature Act, 1875, shews that it was intended to preserve existing procedure, so far as it was not inconsistent with the new procedure. The order of Cleasby, B., must be rescinded.

FIELD, J. I am of the same opinion. The counsel for the defendant has cited no authority in which an order like the present has been upheld. The cases upon which he relies are not in point for the present application of the defendant, in which the person to make the affidavit is not resident within the jurisdiction.

Appeal allowed.

Solicitors for plaintiffs: *Stibbard, Gibson, & Cronshey.*
Solicitors for defendant: *Walton, Bubb, & Walton.*

March 5.

BEDWELL *v.* WOOD.

Arbitration under Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 3 —*Power of Arbitrator to certify for Costs under* 30 & 31 *Vict. c.* 142, *s.* 5.

An action having been referred, under the Common Law Procedure Act, 1854, s. 3, to a master, "with all the powers of certifying of a judge at nisi prius, the costs of the cause and of the reference to be in the discretion of the master," the master made his award in favour of the plaintiff for a sum not exceeding 20*l.*, and directed that the costs of the cause and of the reference should be paid by the defendant. After the award had been taken up, the master endorsed on the award a certificate that there was sufficient reason for bringing the action in the superior Court:—

Held, that the certificate was bad, the master being functus officio when it was given.

ACTION brought in March, 1876, for 21*l.* 12*s.*, for work and labour and materials. On the 4th of December, on the plaintiff's application, the action was by a master's order referred, under 17 & 18 Vict. c. 125, s. 3, to the certificate of a master, "with all the powers of certifying and amending of a judge at nisi prius, the costs of the cause and the costs of the reference to be in

the discretion of the master." After several meetings had taken place the master, by his award dated the 11th of January, 1877, certified for the plaintiff for 6*l.* 1*s.* 10*d.*, and directed that the costs of the cause and of the reference should be paid by the defendant, and that judgment for the plaintiff might be entered on the 20th of January for the debt and costs, unless in the meantime the same were paid. A copy of the certificate was served on the defendant on the 29th of January. On the 30th an application to tax the plaintiff's costs was refused on the ground that the amount awarded was under 20*l.* On the 6th of February the master to whom the action had been referred, on the ex parte application of the plaintiff, endorsed on his award, "I certify that there was sufficient reason for bringing the action in the superior Court." After this the plaintiff's costs were taxed at 42*l.* 8*s.*

The defendant moved to set aside the certificate of the 6th of February.

Candy, for the defendant. The certificate is bad on three grounds:—1. A master under such a reference as the present has no power of certifying for costs if the amount awarded does not exceed 20*l.*, even though by the express terms of the reference the costs of the reference are to be in the discretion of the master; for those terms are to be construed to mean costs recoverable by law: *Moore* v. *Watson*. (1) The County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5 (2), deprives the plaintiff of costs. 2. The words of the reference do not give the master the power of certifying for costs: per Byles, J., in *Wigens* v. *Cook*. (3) 3. Having made and published his award the master was functus officio, and had no power of certifying, unless the Court gave him power by remitting the matter to him: *Spain* v. *Cadell* (4); *Geeve* v. *Gorton* (5);

(1) Law Rep. 2 C. P. 314.

(2) By that section, "If in any action commenced after the passing of this Act in any of the superior Courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

(3) 28 L. J. (C.P.) at p. 315.

(4) 8 M. & W. 129.

(5) 3 Dowl. & L. 481.

1877

BEDWELL v. WOOD.

Smith v. *Edge* (1), approved in *Cowell* v. *Amman Colliery Co.* (2) Where a judge has power to certify "immediately afterwards," ten days after the verdict is too late: *Forsdike* v. *Stone* (3). The plaintiff ought to have applied to the Court to allow his costs under s. 5 of 30 & 31 Vict. c. 142: *Harland* v. *Mayor, &c., of Newcastle* (4).

Bradford, for the plaintiff. The master clearly had the power of certifying for costs at the time of making the award: *Spain* v. *Cadell* (5), per Alderson, B. A judge has power to certify after the trial, and a commissioner sitting as a judge has the same power: *Bennett* v. *Thompson* (6). Therefore an arbitrator, who has all the powers of certifying of a judge at nisi prius, must have the same power. In *Moore* v. *Watson* (7) there was no power to certify.

Candy was not heard in reply.

CLEASBY, B. This application is only to set aside the master's certificate of the 6th of February, and it is not necessary to consider the question raised in *Moore* v. *Watson* (7). The master in the first instance acted on that case, and refused to tax the plaintiff's costs, and as I think properly, for I concur in the reasoning of that case. But it is said that the master had power to give the plaintiff his costs by a certificate, though the amount recovered did not exceed 20*l*. Probably the terms of the order of reference "all the powers of certifying and amending of a judge at nisi prius," would include the power to grant a certificate for costs; but the only question here is whether the master could give a certificate for costs after he had made and published his award, and the parties had taken it up. It is sufficient to hold that he could only certify for costs while the case was before him under the order of reference. By that order the cause was referred to the certificate of the master; the certificate is to decide everything; as soon as the certificate was granted he has decided everything; it is the mode of concluding. There might be some

(1) 2 H. & C. 659; 33 L. J. (Ex.) 9.
(2) 6 B. & S. 333; 34 L. J. (Q.B.) 161.
(3) Law Rep. 3 C. P. 607.
(4) Law Rep. 5 Q. B. 47.
(5) 8 M. & W. at p. 131.
(6) 25 L. J. (Q.B.) 378.
(7) Law Rep. 2 C. P. 314.

difficulty in seeing how the master could comply with the terms of 30 & 31 Vict. c. 142, s. 5, and "certify on the record," when there is no record; but Alderson, B., in *Spain* v. *Cadell* (1) points out that the arbitrator, though he cannot follow literally the power of the judge at nisi prius, "is bound to follow cyprès—the mode of doing which is by immediately inserting his certificate in the award." Not having done so, he had no power to deal with the matter afterwards, unless the Court had exercised their power of sending the cause back to him. That question is not before us, and if it were it is not a case in which we should send it back.

Our decision is that the master must exercise his power of certifying for costs in his award, if at all. If he does not do so then he cannot afterwards. The question whether a certificate was necessary at all is still open to the plaintiff, if he thinks proper to raise it.

FIELD, J. I am of the same opinion. The question is whether, when the master gave the certificate for costs, he had the powers of certifying of a judge at nisi prius. That he had when the cause was before him I have no doubt, and he could have certified on the record. Technically, indeed, there was no record; but, as Alderson, B., pointed out in *Spain* v. *Cadell* (1), the master might have certified in the award at the time of making it. But the authority of an arbitrator or a master expires with the award, unless it is revived by the Court. Therefore when the master certified for costs he had not the powers of a judge at nisi prius, and could not certify on the record. Certifying for costs is a matter of judicial discretion which ought to be exercised only when the whole case and the parties are before the arbitrator. It is a different question from the question whether the plaintiff is entitled to the verdict, and it ought to be discussed when both parties are present.

Order absolute to set aside the certificate for costs.

Solicitor for plaintiff: *H. Randall.*
Solicitor for defendant: *W. Wright.*

(1) 8 M. & W. at p. 132.

1876
March 27.

HEAP *v.* MARRIS.

Supreme Court of Judicature Act, 1875, *Order XIX., Rule* 4; *Order XXVII., Rule* 1—*Pleading—Embarrassing Defence—Equitable Defence—Mode of Stating Facts relied on by Party pleading.*

Where in an action brought in the Queen's Bench, Common Pleas, or Exchequer Division, the defendant relies upon such a defence as before the Supreme Court of Judicature Acts, 1873 and 1875, was deemed equitable, he is entitled (subject to the modifications introduced by those statutes) to state the facts in his pleading in such manner as they might have been stated in an answer to a bill in the Court of Chancery; and a defence stating many distinct facts, which taken as a whole would in equity have constituted ground for relief against the action, is not liable to be amended or struck out as embarrassing under Order XXVII., Rule 1.

The writ was issued on the 4th of January, 1877.

The claim alleged that the plaintiff and the defendant had agreed to marry one another, and by an agreement bearing date the 17th of December, 1872, the defendant agreed with the plaintiff to become his wife on or before the 1st of January, 1875, or in default thereof the defendant promised to pay to the plaintiff the one-third portion of any properties or moneys she might receive under the will of her parents, by way of compensation to the plaintiff and in consideration of his having waited many years to make the defendant his wife; that by the agreement above-mentioned the defendant further agreed to pay to the plaintiff an annuity of 20*l.* per annum, commencing from the year 1875, the annuity to be doubled each year until the defendant should become the wife of the plaintiff; that the defendant had received under the will of her parents certain properties and money; that the plaintiff had always been ready and willing to marry the defendant, yet the defendant had neglected and refused to marry the plaintiff or to pay him the one-third as agreed and the annuity for 1876.

The defence contained many paragraphs, the substance of which was as follows: In 1859 the plaintiff, whose position in life was much inferior to the defendant's, without the knowledge of her parents paid his addresses to her; the defendant was an only child. In 1861 the parents first became aware of the intimacy between the plaintiff and the defendant, and thereupon they forbade the defendant from continuing the acquaintance with the plaintiff, and this

was then communicated to him. The plaintiff induced the defendant to enter into a clandestine correspondence and into an engagement of marriage with him, to be concealed from the defendant's parents; from the year 1861 down to July, 1875, when the defendant's father died, correspondence passed and interviews took place between them, and the engagement of marriage was continued; the correspondence, interviews, and engagement were concealed from her parents. For many years before the day when the defendant signed the agreement sued on, the plaintiff applied to the defendant for, and received from her sums of money, and from the commencement of the year 1869 the plaintiff constantly endeavoured to induce the defendant to execute a bond or contract to secure to him an annuity, or large sum of money, out of the property or moneys which she might receive under her parents', and especially her father's will. The plaintiff knew that the defendant was very much afraid of her parents becoming acquainted with the correspondence, engagement, and interviews before mentioned, and for the purpose of inducing the defendant to execute such bond or contract he announced to the defendant that he intended to inform her parents of such interviews, correspondence, and engagement; and thereupon the defendant, being wholly without experience of business, and wholly without advice or counsel, was induced, by the influence of the plaintiff and by his threat to inform her parents, to sign the agreement sued on. The defendant admitted that under her father's will she became entitled to certain properties and moneys, but he was always ignorant of the correspondence, interviews, and engagement of marriage above-mentioned, and also of the agreement between the plaintiff and the defendant.

The plaintiff obtained an order from a master that the statement of defence should be amended in ten days by stating the facts and not the evidence: upon appeal to Field, J., this order was affirmed.

March 26, 27. *Benjamin, Q.C.*, for the defendant, moved by way of appeal from the decision of Field, J. The defence is such as before the Supreme Court of Judicature Acts, 1873 and 1875, was called equitable, and therefore, subject to the

1877

HEAP v. MARRIS.

modifications in the rules of pleading introduced by those statutes, the defendant is entitled to state the facts upon which she relies, according to the practice of the Court of Chancery. The decisions of the master and of Field, J., at chambers, appear to have proceeded upon the ground that the defence ought simply to have alleged that the contract sued upon was obtained by the duress and undue influence of the plaintiff; but this is an erroneous construction of the Supreme Court of Judicature Act, 1875, Order XXVII., Rule 1 (1). In *Woodhouse* v. *Shepley* (2), a very similar case to the present, Lord Hardwicke, L.C., points out (p. 540) that a number of improper circumstances may be sufficient to avoid a contract, although not one of them taken singly would have that effect. The defendant, therefore, is entitled to allege any circumstances shewing that the contract sued on is inequitable or exorbitant; and if they were not duly stated upon the pleadings, she would be unable to rely upon them at the trial. The allegation that the defendant's father made his will in ignorance of the renewed engagement and of the contract sued on is very material to the defence; for the contract under the circumstances is voidable in equity upon the ground that it was a fraud upon him: *Woodhouse* v. *Shepley* (2); Story's Equity Jurisprudence, par. 274, 275. The contract was also voidable on the ground that it was obtained from the defendant, who had large expectations on the death of her father: *Chesterfield* v. *Janssen* (3), and the cases there cited. The pleading of the defendant may be prolix, but if any injury is thereby done to the plaintiff a remedy is created by Order XIX., Rule 2, which casts the costs occasioned by unnecessary prolixity in pleading upon the party chargeable with the same.

J. A. McLeod, for the plaintiff. *Woodhouse* v *Shepley* (2) is not

(1) By the Supreme Court of Judicature Act, 1875, Order XXVII, Rule 1, "the Court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

(2) 2 Atk. 535.

(3) 1 W. & T. (L. C. in Eq.) 541.

in point for the present action; in that suit relief was sought against the penalty of a bond. The plaintiff does not at present contend that the allegations relied on by the defendant do not, if proved, form a defence to the action; the objection is to the mode of stating them. The question now raised is one of practice and not of law. The mode of pleading is embarrassing; at the trial before a jury it will be almost impossible for the judge to determine what questions are to be left to them. Moreover, the master and Field, J., have exercised their discretion at chambers, and their decision that the pleading must be amended ought not to be interfered with: *Golding* v. *Wharton Saltworks Co.* (1)

GROVE, J. I have come to the conclusion that the order of Field, J., was wrong, and must be set aside. In my opinion it was the intention of the legislature in introducing a new practice and procedure to follow as guides the practice and procedure previously existing in the Court of Chancery; and this is a matter not to be forgotten in construing the Supreme Court of Judicature Acts, 1873 and 1875.

By Order XIX., Rule 4, of the Act of 1875, it is enacted that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved;" and a reference to the forms given in Appendix C. seems to shew that it was intended to supersede the forms of pleading existing at common law, and that a defendant who wishes to rely upon what used to be called an equitable defence, is quite at liberty (subject to the modifications introduced by the Acts themselves) to plead it in the manner in which it might have been pleaded as an answer to a bill in Chancery. And the statement of defence in the present action is framed in much the same language with that in which an answer used to be drawn. If it were embarrassing, I should be of opinion that the order of Field, J., ought to be upheld; but I cannot say that it is embarrassing. It is no doubt very prolix; but all that we could do would be to abbreviate the language and render it more

(1) 1 Q. B. D. 374.

1877

HEAP v. MARRIS.

concise. This form of pleading is useful at a trial before a judge sitting alone; and although it may not be quite so convenient at a trial with a jury, still I cannot think that it will prejudice the fair trial of the action. I think that the allegations in the statement of the defence are "material facts" within the meaning of Order XIX., Rule 4. This appeal must be allowed, but as the attention of Field, J., was not drawn to the authorities in equity, costs will not be given to the defendant.

FIELD, J. After the discussion which has taken place before us, I have come to the conclusion that my order was not warranted by the materials before me at chambers. The plaintiff alleged that I ought to strike out the statement of defence, and I was then of that opinion, for I thought the defendant's pleading embarrassing. It is clear upon reference to the authorities that the allegations in the statement of defence afford an answer to the action, if they are proved at the trial; but my attention was not drawn to the decisions in equity, and I did not receive any assistance from them in determining the case. My order cannot stand as it prevents the defendant from setting up a defence which she is entitled to have upon the record; but as this appeal would have been unnecessary if the case had been properly conducted at chambers, I agree with Grove, J., that the defendant ought not to have any costs.

Appeal allowed.

Solicitors for plaintiff: *Lewis & Lewis.*

Solicitors for defendant: *Scott, Jarmain, & Trass, for D. M. Robbs, Brigg.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

ACCESSORY — *After the Fact — Murder — Manslaughter—Indictment as accessory to Murder—Conviction as accessory to Manslaughter.*] Several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter:—*Held*, that those charged as accessories might rightly be convicted as accessories to manslaughter. THE QUEEN *v.* RICHARDS C.C.R. 311

ACT OF STATE - - - - 210
See JURISDICTION.

ACTION—Commenced in Chancery Division 605
See PRACTICE. 10.

—— For amount not exceeding 20*l.* - 125
See COUNTY COURT.

—— For nuisance raising question of title 615
See PRACTICE. 14.

—— Ordered to be tried in County Court - 177
See PRACTICE. 6.

ADMISSION BY DEMURRER - - 189
See USE AND OCCUPATION.

ADULTERATION—*Sale of Food and Drugs Act (38 & 39 Vict. c. 63), s. 6—Gin diluted with Water.*] The appellant, a publican, was convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for "selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance, and quality of the article demanded by such purchaser." A person asked for a pint of gin at the appellant's premises. The appellant said that he had gin at 2*s.* and 1*s.* 4*d.* per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43·15 per cent. of water, that is, it was 43·15 below proof, but the mixture was not injurious to health. The magistrate found that their was no recognised standard of alcoholic strength for gin, but that it varied from proof to 20 under proof:—*Held*, that whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate; and that there was sufficient evidence to justify the conviction. WEBB *v.* KNIGHT - - - 530

ADULTERY—Receiving stolen goods - 307
See LARCENY.

AGENT — *Misappropriation by* — 24 & 25 *Vict. c.* 96, *s.* 75.] The prisoner was indicted under the second branch of 24 & 25 Vict. c. 96, s. 75, for that he being entrusted, as a broker, attorney, or agent, with valuable securities for a special purpose, without authority to sell, negotiate, transfer, or pledge them, unlawfully and contrary to the purpose for which the securities were entrusted, converted to his own use a part of the proceeds. The facts proved were as follows:—The prisoner was an insurance broker, and had, as such, effected insurances on a ship for the prosecutor; and the ship having been lost, the prosecutor sent him the policies, three in number, one with the A. office, one with the I. office, and one with underwriters, with other documents necessary for recovering the loss. On the 17th of December, the prisoner received the amount of I. office's policy, and on the 31st of December, the amount of the A. office's policy. Each amount was paid him by a cheque to his own order, which in each case he paid into his own bank to his own credit. The prisoner did not pay over to the prosecutor any of the money so received by him; but, being pressed for it, gave various excuses for not doing so. On the 27th of January following, he filed a petition for liquidation; and his balance at his bank was then much less than the sum received on the policies. The prisoner having been convicted on these facts:—*Held* (by Cockburn, C.J., Kelly, C.B., Bramwell and Amphlett, JJ.A., Pollock, B., and Field, J.), that the conviction was wrong.—By Cockburn, C.J., on the ground that, even assuming the prisoner could have been properly convicted if there had been evidence that the prisoner had received the money with the intention of embezzling it, in the absence of such evidence and a finding to that effect, he could not be convicted.—By Kelly, C.B., and Pollock, B., on the ground that, in the absence of evidence of the previous course of dealing between the parties, and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld.—By Bramwell and Amphlett, JJ.A., and Field, J., on the ground that the branch of the section in question applies only to the case of an agent, entrusted with securities without authority to obtain money upon them, who wrongfully appro-

AGENT—*continued.*
priates the securities, or wrongfully obtains money upon them and appropriates the money; following *Reg.* v. *Cooper* (Law Rep. 2 C. C. 123.) THE QUEEN *v.* TATLOCK - - - C. C. R. 157

AGREEMENT — Not to be performed within a year - - - - - 314
See FRAUDS, STATUTE OF.

—— For purchase of business - - 214
See COMPANY. 1.

ALLOWANCE OF ONE-THIRD NEW FOR OLD
See MARINE INSURANCE. [501

APPEAL - - - - 37, 43, 117
See PRACTICE. 1, 2, 3.

—— - - - - - - - 314
See FRAUDS, STATUTE OF.

—— By motion - - - - 125
See COUNTY COURT.

APPLICATION FOR NEW TRIAL - - 575
See PRACTICE. 11.

APPORTIONMENT—Notice of - - 389
See LOCAL GOVERNMENT ACT.

APPROPRIATION BY LORD OF PORTION OF WASTE - - - - 433
See COMMON OF TURBARY.

ARBITRATION—*Under Common Law Procedure Act*, 1854—(17 & 18 *Vict. c.* 125), *s.* 3—*Power of Arbitrator to certify for Costs under* 30 & 31 *Vict. c.* 142, *s.* 5.] An action having been referred, under the Common Law Procedure Act, 1854, *s.* 3, to a master, "with all the powers of certifying of a judge at nisi prius, the costs of the cause and of the reference to be in the discretion of the master," the master made his award in favour of the plaintiff for a sum not exceeding 20*l.*, and directed that the costs of the cause and of the reference should be paid by the defendant. After the award had been taken up, the master endorsed on the award a certificate that there was sufficient reason for bringing the action in the superior Court:—*Held*, that the certificate was bad, the master being functus officio when it was given. BEDWELL *v.* WOOD - - - - 626

ASSIGNMENT—By grantee of interest under bill of sale - - - - 361
See BILLS OF SALE ACT.

AUCTION — *Personal Liability — Conditions of Sale—Delay in clearing Goods within prescribed Time—Condition Precedent.*] In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues, headed "Great Western Railway Company. Catalogue of unclaimed property, &c., which will be sold by auction by Messrs. H. & E. (the defendants), on Tuesday, November 7th, and following day. By order of the directors of the above company, &c." The catalogue contained, amongst others, the following conditions: "The lots to be cleared away within three days after the sale at the purchaser's expense, &c. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be

AUCTION—*continued.*
resold by public or private sale without further notice, and the deficiency made good by the defaulter." — The plaintiff attended the sale, received a catalogue, bought one of the lots, and paid a deposit. He did not fetch the goods away on Saturday (the last of the three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendants' possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. The plaintiff having been nonsuited:—*Held*, first, that on the face of the catalogue and conditions there was evidence that the defendants contracted personally with the plaintiff for the delivery of the goods purchased by him. Secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery. WOOLFE *v.* HORNE 355

AUTHORITY TO ENTER PREMISES - 179
See JUSTICES, CASE STATED BY. 1.

AUXILIARY STEAM PUMPING POWER - 295
See SHIP. 6.

AWARD—Compensation by magistrate for damages caused by furious driving a bar to further proceeding - - 271
See RES JUDICATA.

BAILOR AND BAILEE - - - 279
See MASTER AND SERVANT.

BANKRUPTCY—*Composition Deed—Liability of Surety—Construction.*] B., having presented a petition for the liquidation of his affairs, the statutory majority of his creditors passed a resolution accepting a composition payable in three instalments, the last instalment to be guaranteed by the defendant. The defendant signed a guarantee accordingly, and a deed was made between B., the defendant, and certain persons called "the inspectors." The creditors of B. were also made parties to the deed, but some of them did not execute it. By the deed, after reciting that it had been agreed that, until payment of the composition, B. should carry on his business under the inspectors, it was provided that if B. should make default in the payment of it, or if it should appear to the inspectors, from the state of his business or otherwise, that the instalments would not be duly met, it should be lawful for them to apply to the Court of Bankruptcy to adjudge him a bankrupt, and without prejudice to this right it should be lawful for them in any such event to require him to assign all his property to them, as if they were trustees under liquidation proceedings, and further, that, "in the event of B. being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed before full payment of the composition, the defendant should be released from his guarantee." B., having made default in payment of the second instalment, was made bankrupt on the petition of a creditor who was not bound by the resolution, and had not executed the deed. After the bank-

BANKRUPTCY—*continued.*
ruptcy he made default in payment of the third instalment:—*Held*, affirming the judgment of the Queen's Bench Division, that the defendant was liable; as he could only be released from his guarantee by a bankruptcy procured by the inspectors under the provisions of the deed. GLEGG *v.* GILBEY - - - - - 6; C. A. 209

BASTARDY—*Corroboration of Mother—"Material Particular"—Evidence of Acts of Familiarity before the Time when the Child could have been begotten—Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s*, 4.] Upon the hearing of a complaint in bastardy, the statement of the mother as to the paternity of the child may be sufficiently corroborated by the evidence of acts of familiarity between her and the defendant, although these acts have taken place at a time before the child could have been begotten; for evidence of this kind is a corroboration of the mother "in some material particular" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 4. COLE *v.* MANNING - - 611

BILL OF EXCHANGE—*Accommodation Bill—Notice of Dishonour.*] Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonour. TURNER *v.* SAMSON - C. A. 23

BILLS OF SALE ACT (17 & 18 *Vict. c.* 36) (29 & 30 *Vict. c.* 96), *s.* 4—*Renewal of Registration of Bill of Sale—Assignment by Grantee of Interest under Bill of Sale.*] The Act 29 & 30 Vict. c. 96, s. 4—which requires the registration of a bill of sale under 17 & 18 Vict. c. 36 to be renewed every five years, in default of which the registration ceases to have any effect—is equally imperative when the grantee, before the period for renewal, assigns his interest under the bill of sale to a third person; and the assignee, if the registration is not renewed, has no title as against an execution creditor. KARET *v.* THE KOSHER MEAT SUPPLY ASSOCIATION, LIMITED - 361

BOROUGH—Contribution to county rate - 544
See MUNICIPAL CORPORATION ACT.

BREAK OF RESIDENCE - - - 522
See POOR LAW. 2.

BRIDGE - - - - - - 224
See FERRY.

BYE-LAWS - - - - - - 397
See ELEMENTARY EDUCATION ACT.

CAB PROPRIETOR - - - 279
See MASTER AND SERVANT.

CARRIAGE OF MERCHANDISE - - 455
See SHIP. 2.

CASES—*Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 330) followed - - - 112
See SALE OF GOODS. 1.

—— *Chilton* v. *London and Croydon Co.* (16 M. & W. 212) discussed - - 406
See RAILWAY COMPANY. 2.

—— *Goodwin* v. *Robarts* (1 App. Ca. 476) followed - - - - 194
See NEGOTIABLE INSTRUMENT.

CASES—*continued.*

—— *Great Western Ry. Co. v. May* (Law Rep. 7 H. L. 283) distinguished - 339
See LANDS CLAUSES ACT. 2.

—— *Gumm* v. *Fowler* (2 E. & E. 890; 29 L. J. (Q.B.) 189) observed upon - 314
See FRAUDS, STATUTE OF.

—— *Hardman* v. *Booth* (1 H. & C. 803; 32 L. J. (Ex.) 105) followed - - 96
See SALE OF GOODS. 3.

—— *Peacock* v. *The Queen* (4 C. B. (N.S.) 264) not followed - - - 284
See JUSTICES.

—— *Pickard* v. *Smith* (10 C. B. (N.S.) 470) considered - - - - 276
See MASTER AND SERVANT.

—— *Powles* v. *Hider* (6 E. & B. 207; 25 L. J. (Q.B.) 331) followed - - 277
See MASTER AND SERVANT.

—— *Reg.* v. *Barrow* (Law Rep. 1 C. C. 156) questioned - - - - 410
See RAPE.

—— *Reg.* v. *Cambrian Ry. Co.* (Law Rep. 6 Q. B. 422) overruled - - - 224
See FERRY.

—— *Reg.* v. *Cooper* (Law Rep. 2 C. C. 123) followed - - - - 157
See AGENT.

—— *Reg.* v. *Deer* (L. & C. Cr. C. 240; 32 L. J. (M.C.) 33); *Reg.* v. *Featherstone* (Cr. C. 369; 23 L. J. (M. C.) 127) explained
See LARCENY. [307

—— *Reg.* v. *Long* (1 Q. B. 740) distinguished 371
See SESSIONS.

—— *Rodger* v. *Comptoir d'Escompte de Paris* (Law Rep. 2 P. C. 393) dissented from
See SHIP. 1. [376

—— *Siner* v. *Great Western Ry. Co.* (Law Rep. 4 Ex. 117) distinguished - - 85
See NEGLIGENCE.

CENTRAL CRIMINAL COURT - - 210
See JURISDICTION.

CERTIFICATE—Result of hearing cause - 177
See PRACTICE. 6.

CHARTERER—Consignee of cargo - - 238
See SHIP. 4.

CHARTERPARTY - - 182, 238, 423
See SHIP. 3, 4, 5.

COMMENDATION—Quality of goods - 301
See FALSE PRETENCES. 2.

COMMON OF TURBARY—*Manor—Common of Estovers—Appropriation by Lord of Portion of Waste—Evidence of Custom allowing Lord to approve—Grant of Turbary and Estovers as appurtenant to enfranchised Hereditament, but subject to Customs of Manor—Evidence of Custom for Lord with Consent of Homage to grant Parcels of Waste—Freeholders bound by Consent of Homage of Copyholders—Evidence that sufficient Common of Pasture has been left after Inclosure.*] Where the lord of a manor has appropriated by leasing and also has granted out by copy of court roll portions of the waste, the fact that there has been a sufficiency of common of pasture during ten years is evidence that the inclosures have not interfered

COMMON OF TURBARY—*continued.*
with the rights of the commoners.—In 1751 the lord of the manor of C. demised a brick-kiln then standing on the waste thereof, with liberty to inclose a piece of land not exceeding half an acre, and to dig earth for the use of the kiln; this lease, after its expiration, was renewed from time to time, and meanwhile leases of other parts of the waste were granted for the purpose of erecting thereon kilns and of digging clay. During the currency of the lease made in 1751 presentments were made by the homage of encroachments on the waste by strangers; but no objection was made to the granting of the leases, and the commoners bought bricks at the kilns:—*Held*, that the granting of the leases ought to be referred to a legal origin, and that there was evidence sufficient to establish that the lord of the manor had by custom the right to approve, so that he left a sufficiency of turbary and estovers to the commoners.—By a deed, made in 1614, certain copyhold land of the manor of C. was enfranchised, and thereby the lord granted to G. M. "all and all manner of turbaries, digging and carrying of turfs, estovers, and common of estovers, heath, and fern . . . . in such sort, nature, quality, and condition as the freeholders and tenents in free socage of the said manor, within the parish of C. aforesaid, have used and enjoyed the same":—*Held*, that the terms of the deed afforded no evidence that at the time of its execution the freeholders of the manor had larger rights of common than the copyholders: and—*Held*, further, that the deed did afford evidence that the grant of common of turbary and estovers to G. M. was made subject to the customs of the manor; and, therefore, that the lord could approve as against the successor in the title of G. M.—The court rolls of the manor of C. contained twelve entries relating to grants by the lord of parcels of the waste; the entries commenced in 1664 and ended in 1858 (with a break of many years), and in ten of them it was stated that the homage consented to the grant; the land included in the whole of these grants amounted to rather more than 51 acres, the extent of the waste being about 4500 acres. The homage was composed wholly of copyholders:—*Held*, that the entries afforded evidence of a custom within the manor to grant parcels of the waste with the consent of a homage of copyholders, and that the custom was valid as against the freeholders having rights of common over the waste. Lascelles *v.* Onslow [433

COMMON OF ESTOVERS - - - 433
See Common of Turbary.

COMPANY—*Agreement for Purchase of Business—Vendor guaranteeing Dividend—Resolution to release Vendor from Liability—Fraud—Right to rescind.*] By agreement between the defendant and the promoters on behalf of an intended company the defendant agreed to sell to the company several patents belonging to, and several businesses carried on by, him. The company was incorporated under the Companies Acts, 1862 and 1867, the memorandum of association describing the objects of the company, amongst others, as the purchasing or acquiring the businesses and patents belonging to the defendant, and working the patents. The articles of association, which were

COMPANY—*continued.*
dated and registered on the same day as the memorandum of association, set out the agreement with the defendant, and declared that it should be binding upon the company and read as part of the articles themselves. By the agreement itself, the defendant was to be chairman of the board of directors and managing director of the company for five years, and to be paid such salary as the company might determine. The purchase-money was to be paid the defendant, part in fully paid-up shares and the balance by instalments in money. The defendant on his part promised to guarantee to the company a minimum dividend of 15*l.* per cent. on all the paid-up capital of the company. The company carried on the businesses for one year under the agreement, and the defendant paid them the amount sufficient to make up the 15*l.* per cent. Shortly afterwards a resolution was passed by the directors and carried at a general meeting duly convened for the purpose, whereby the defendant was released from his guarantee upon surrendering his shares and giving up to the company his right to certain patents. The defendant retired accordingly from his office as director, giving up his shares and right to the patents, and the company proceeded to sell one of the businesses and one of the patents. The company afterwards claimed to set aside the resolution and enforce the guarantee, on the ground that the defendant had fraudulently misdescribed the property sold by him:—*Held*, first, that the resolution was not in excess of the powers of the company, and was binding on them; secondly, that assuming that the resolution had been passed in consequence of fraudulent misrepresentations on the part of the defendant, his position had been so far changed that it was too late for the company to repudiate the contract. The Sheffield Nickel and Silver Plating Company, Limited, *v.* Unwin - - - - - 214

2. —— *Meeting — One Shareholder — Stannaries Act* (32 & 33 *Vict. c.* 19, *s.* 4.] A single shareholder cannot constitute a meeting of a company under the Stannaries Act, 1869, s. 4. Sharp *v.* Dawes - - - C. A. 26

3. —— *Rectification of Register—Jurisdiction of Court under s.* 35 *of Companies Act*, 1862 (25 & 26 *Vict. c.* 89)—*Question of Title—Default in Company.*] In order to give jurisdiction to the Court or judge to order rectification of the register of shareholders in a company, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), it is not necessary that there should be actual default in the company.—It is a matter of discretion whether the Court or judge will exercise the summary jurisdiction; and in a complicated or doubtful case the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made.—S. employed A. to buy for him forty shares in a limited company. A. negotiated for the purchase with P., who was the registered holder of forty shares. S. paid A. the purchase-money for the shares. P. executed a transfer to S., and forwarded it to the secretary of the company, together with the scrip, and the secretary wrote on the transfer, "certificates lodged at company's office," and returned it to P., retaining

COMPANY—*continued.*

possession of the scrip. P. forwarded the transfer to A., and he sent it to S., who executed the transfer and returned it to A., in order that he might get S.'s name put upon the list of shareholders, the articles of association requiring the duly executed transfer to be lodged at the chief office of the company before the transferee could be registered. A. acted throughout for both parties, but he did not pay over the price to P., and falsely told him that the purchaser would not complete; upon which P. demanded back the transfer, and A. cut off P.'s signature from the transfer and sent the signature to P., and afterwards absconded. S. demanded to have his name put upon the register as the owner of the forty shares, for which the scrip had been deposited with the company; but the company refused, at the instigation of P. On affidavits disclosing these facts, S. applied, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), for a judge's order to rectify the register by inserting S.'s name as the holder of the forty shares. P. opposed the summons; the company appeared, but offered no opposition. The order having been made as prayed:—*Held*, by the Common Pleas Division and Court of Appeal, that, S. having paid P.'s agent for the shares, and the transfer having been duly executed, S. had a legal title to the shares; that the judge had jurisdiction to decide the matter, if he thought right, and that he had exercised a proper judicial discretion in deciding and making the order. In the Matter of the Diamond Rock Boring Company, Limited. Ex parte Shaw. **C. A.** 463

COMPENSATION—Lands Clauses Act - 151
See Lands Clauses Act. 1.

—— - - - - - - 224
See Ferry.

COMPOSITION DEED - - - 209
See Bankruptcy. 1.

CONDITIONS OF SALE - - - 355
See Auction.

CONSENT—Rape - - - - 410
See Rape.

—— of Attorney General - - - 608
See Local Government Acts. 2.

CONSPIRACY—*To defraud—Sufficiency of Indictment—Obtaining Quotation for Shares of new Company by false Pretences—Official List of Stock Exchange.*] In an indictment for conspiracy, the first count stated that "The Stock Exchange" was managed by a committee for general purposes, who had adopted rules and regulations for the conduct of business on the Stock Exchange; and that defendants were promoters of the E. Company, Limited, a new company which had proposed to raise a capital of 35,000*l.* by subscriptions of shares of 1*l.* each in addition to 15,000*l.* represented by 15,000 fully paid-up shares. That by the rules and regulations of the Stock Exchange all persons dealing in the shares of a new company required, for the purpose of making their contracts enforceable according to these rules and regulations, that a special settling day should be fixed by the committee for general purposes, upon which day all shares which had been theretofore bought and sold should be delivered and paid for, &c. That application had been made on behalf of the defendants to the committee to appoint a settling day for transactions in the shares of the company, and that it became necessary that the company should comply with certain rules duly issued by the committee, to the effect, 127, that a settling day would be appointed, provided that no allegations of fraud be substantiated, that there had been no misrepresentation or suppression of material facts, &c.; 128, that, previous to such application being submitted to the committee, production of the following documents should be required,—the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon. The count then alleged that the plaintiffs conspired to injure and deceive the committee by false pretences (setting them out), and to induce them to appoint a settling day for the company.—Second count: That defendants were promoters of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule, 129, duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of bonâ fide character, &c., that the requirements of Rule 128 had been complied with, that two-thirds of the whole nominal capital proposed to be issued had been applied for and unconditionally allotted to the public, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that defendants requested a firm of stock-brokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5000 shares of the company on behalf of alleged vendors of patents, and that defendants unlawfully conspired and agreed by divers false pretences to injure and deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's liege subjects, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And that defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public was 34,365, and that the amount received thereon, at 10*s.* per share, was 17,282*l.*, that 15,000 had been allotted to the patentee, and that no shares had

CONSPIRACY—*continued.*
been conditionally allotted; and thereby induced the committee to order the shares to be quoted in the official list.—A verdict of guilty having been returned, and judgment entered thereon, on error:—*Held*, affirming the judgment of the Queen's Bench Division, that the second count was good after verdict, and sufficiently alleged a criminal conspiracy; for that it contained allegations, some accurately and some inaccurately stated, which, assuming them to have been found proved in a sense adverse to the defendants, shewed that there was an agreement by them to cheat and defraud, by means of false pretences, those liege subjects who might buy shares in the company. The Queen *v.* Aspinall - - C. A. 48

CONTAGIOUS DISEASES (ANIMALS) ACT, 1869
See False Representation. [331

CONTRACT—Contained in several documents 314
See Frauds, Statute of.

CONVICTION—Quashed on point of form - 516
See Mandamus.

CORROBORATION—Statement of mother 611
See Bastardy.

COSTS - - - - 37, 117, 171, 325
See Practice. 1, 3, 4, 5.

COST OF REPAIRS - - - - 501
See Marine Insurance.

COUNTER-CLAIM - - - - 498
See Practice. 13.

COUNTING OF VOTES - - - 608
See Local Government Acts. 2.

COUNTY COURT—*Appeal by Motion—Action for Amount not exceeding 20l.*—13 & 14 *Vict. c.* 61, *ss.* 1, 14; 30 & 31 *Vict. c.* 142, *s.* 13; 38 & 39 *Vict. c.* 50, *s.* 6.] Under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6—by which "in any cause, suit, or proceeding, &c., tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for the person aggrieved by the ruling, order, direction, or decision of the judge, to appeal against such order, &c., by motion to the Court to which such appeal lies, instead of by special case"—the power of appealing by motion applies to all actions where leave to appeal may be given, as well as to actions where such leave is unnecessary. Turner *v.* The Great Western Railway Company - - - - 125

CROWN - - - - - 69
See Petition, Right of.

DAMAGES—Chattel sold for specific purpose 102
See Sale of Goods. 2.

—— for detention of ship - - - 238
See Ship. 3, 4.

DANCING - - - - - 417
See Music.

DATE—Bill of lading - - - 112
See Sale of Goods. 1.

DECISION OF CHAIRMAN—When conclusive 30
See Local Government Acts. 1.

DEED—*Fraudulent Representation as to Effect of Release.*] Claim, stating that the defendants were carriers of passengers by railway, and the plaintiff was received by them as a passenger in

DEED—*continued.*
an express train which by their negligence came into collision with an engine and he was injured. Defence, that after the collision the plaintiff accepted money from the defendants' officer in satisfaction of his cause of action, and executed a release. Reply, that the defendants' officer procured the plaintiff to execute the release by fraudulently representing to him for that purpose that his injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from the defendants, and that the plaintiff was thereby induced to execute the deed, and that after he had executed it his injuries turned out to be of a more serious nature than he had anticipated:—*Held*, that the reply was good, as it contained a separate and independent statement that the plaintiff was induced to execute the deed in consequence of a fraudulent representation that his injuries were of a trivial and temporary character.—*Semble*, that a fraudulent representation as to the effect of a deed may be relied upon as a defence to an action upon the deed. Hirschfeld *v.* The London, Brighton, and South Coast Railway Company - - - - 1

DEFAULT IN COMPANY - - - 463
See Company. 3.

DEFENCE—Embarrassing - - - 615
See Practice.

DELAY—Clearing goods within a prescribed time
See Auction. [355

DEMURRAGE - - - - 238
See Ship. 4.

DEMURRER—Admission by - - 189
See Use and Occupation.

DETENTION—Ship - - - - 238
See Ship. 4.

DEVISE—*Vested or Contingent Estate—Construction.*] A testator devised his real estate to his grandsons for life, with remainders to their sons in tail successively, and upon the death of the grandsons without issue he devised the estate to his three granddaughters in tail with benefit of survivorship, and in case the granddaughters should die without issue, leaving their father and mother, or either of them, surviving, then he devised the estate to the father and mother, and the survivor of them, for life, and after their death to T. M., J. A., and T. G. in fee. The grandsons survived the testator, but died without issue. One of them also survived the granddaughters, and one of the granddaughters survived both her father and mother:—*Held*, that the devise of the estate for life to the father and mother of the granddaughters was not a contingent remainder, and that the ulterior limitations took effect, notwithstanding the death of both father and mother, in the lifetime of the tenants in tail. Leadbeater *v.* Cross - - - - - 18

DIRECTORY AND NOT IMPERATIVE ENACTMENT - - - - 199
See Valuation (Metropolis) Act.

DISALLOWANCE BY POOR LAW AUDITOR 366
See Vestry Clerk.

DISCONTINUANCE OF RECEIPT - - 485
See Limitations, Statute of.

DISCOVERY - - - - 524, 624
See Practice. 7, 8.

DISCRETION—Magistrate—Form of summons
See Elementary Education Act. [397

DISQUALIFICATION—Bishop - - 588
See Prohibition.

DISTRICT—Added to borough - - 544
See Municipal Corporation Act.

DISTURBANCE—Ferry - - - 224
See Ferry.

DIVISIONAL COURT - - - 605
See Practice. 10.

DOCUMENTS—Affidavit of - - - 624
See Practice. 7.

DOMICILE OF PARTIES - - - 210
See Jurisdiction.

DUTY—Created by statute - - - 145
See Metropolis Management Act.

—— To provide entertainment - - 136
See Innkeeper.

ELECTION OF MEMBER OF LOCAL BOARD [30, 608
See Local Government Acts. 2, 3.

ELEMENTARY EDUCATION ACT, 1870 (33 & 34 *Vict. c.* 75), *s.* 74—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *s.* 11—*By-laws Nos.* 2 *and* 7 *—Habitual or occasional Neglect of Parent to send Child to School—Discretion of Magistrate to direct Form of Summons.*] Where, upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to by-laws made by the board under the Elementary Education Act, 1870, it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act, 1876, s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the by-laws, and to require them to take out a summons under s. 11,—for the option given by the Elementary Education Act, 1876, s. 50, of proceeding either under the statute or the by-laws applies only to offences "punishable" under the Act, and the offence of "habitual neglect" is not so punishable. Ex parte The School Board of London. Re Murphy - - - 397

EMBARRASSING DEFENCE - - 615
See Practice. 14.

EMBEZZLEMENT—*Receipt on Account of Master.*] The prisoner was the clerk and servant of an insurance company, and head manager at their chief office at L. In the ordinary course of business he received several cheques payable to his order from the managers of branch offices, and it was his duty to indorse these cheques and hand them over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. He then took the amount so received to the cashier and handed it over to him, saying he wished it to go against his salary, which was overdrawn to a like amount; and he got back from the cashier I. O. U.s, which

EMBEZZLEMENT—*continued.*
he had previously given for the amount of the overdraft. The prisoner having been convicted of embezzling the proceeds of the cheques:—*Held*, that the proceeds of the cheques, though received, not from the bankers, but from third persons, were received on account of the company, and that the prisoner was rightly convicted. The Queen *v.* Gale - - C. C. R. 141

ENTERTAINMENT OF LIKE KIND - 417
See Music.

ENTRIES—Checked by witness at the time 296
See Evidence.

ESTOPPEL - - - - - 194
See Negotiable Instrument.

EVIDENCE—*Refreshing Memory—Entries checked by Witness at the Time—Joint Stock Company—Evidence of its Existence.*] The prisoner was a timekeeper, and T. C. was pay clerk, in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time book. At pay time it was the duty of the prisoner to read out from the time book the number of days worked by each workman to T. C., who paid the wages accordingly. And T. C. saw the entries in the time book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences:—*Held*, that T. C. might refresh his memory, by referring to the entries in the time book, in order to prove the sums paid by him to workmen.—The prisoner being charged with obtaining by false pretences the moneys of a company:—*Held*, that the existence of the company was sufficiently proved by evidence that it had carried on business as such. The Queen *v.* Langton - - C. C. R. 296

—— Acts of familiarity - - - 611
See Bastardy.

—— Custom of lord to inclose common - 433
See Common of Turbary.

—— Institution of suit—Perjury - - 415
See Perjury.

—— Negligence - - - - 85
See Negligence.

—— Pretences - - - - 510
See False Pretences. 1.

EXMOUTH MARKET ACT, 1867, s. 20 - 127
See Markets Clauses Act.

EXPENSES—Incurred by local board - 389
See Local Government Acts.

EXTRAORDINARY DUTIES - - 366
See Vestry Clerk.

EXTRA-PAROCHIAL PLACE - - 349
See Highway.

FABRICATION OF VOTING PAPER - 608
See Local Government Acts. 2.

FALSE PRETENCES—*Evidence of Pretences.*] C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he then was in a large way of business, that he was in a position to do a good trade in potatoes, and that he was

FALSE PRETENCES—*continued.*

able to pay for large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter written by him to the prosecutor:—"Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, &c.—P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on":—*Held*, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury, whether the writer intended the prosecutor to put that construction upon them. The Queen *v.* Cooper [C. C. R. 510

2. —— *Sale of Goods—Commendation—Misstatement of Nature of Goods.*] On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer from Leicester, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted:—*Held*, that the conviction was right. The Queen *v.* Foster - C. C. R. 301

3. —— *Previous Conviction of Felony—Indictment—Penal Servitude—Sentence.*] A prisoner convicted of obtaining money by false pretences, after a previous conviction for felony (the previous conviction being charged in the indictment), cannot be sentenced to penal servitude for a less term than seven years. The Queen *v.* Deane [C. C. R. 305

FALSE REPRESENTATION—*Contagious Disease, Animals affected with—Sale in Market—Implied Representation that Animals not suffering from Disease—Conditions of Sale—Contagious Diseases (Animals) Act*, 1869 (32 & 33 *Vict. c.* 70), *s.* 57.] A person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to animal life; and a condition of sale that they are to be "taken with all faults" does not negative or qualify this representation. Ward *v.* Hobbs [reversed on appeal, December, 1877] - - 331

FEE FARM RENT - - - - 485

See Limitations, Statute of.

FERRY — *Disturbance—Bridge — Railway Company—Compensation—Lands Clauses Consolidation Act* (8 *Vict. c.* 18), *s.* 68—*Railway Clauses Consolidation Act* (8 *Vict. c.* 20), *s.* 6.] The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.—*Quære*, whether the exclusive right of the owner

FERRY—*continued*

of a ferry extends beyond the carriage of passengers by boat.—A railway company, under the authority of their Act, constructed across a river, half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railway Clauses Acts.—*Held*, reversing the decision of the Queen's Bench Division, that no compensation could be recovered: First, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the footbridge, if they had been erected without the authority of an Act. Secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act.—*Reg.* v. *Cambrian Ry. Co.* (Law Rep. 6 Q. B. 422) overruled. Hopkins *v.* The Great Northern Railway Company - 224

FRAUDS, STATUTE OF, *s.* 4—*Agreement not to be performed within a Year—Contract contained in several Documents—Identification by Parol of Documents mentioned in Signed Document—Effect of Signature by Chairman of Minute Book of Company pursuant to the Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 67—*Appeal—Reference—Special Case*—17 & 18 *Vict. c.* 125, *ss.* 5, 32.] The defendants, a company incorporated under the Companies Act, 1862, entered into negotiations with the plaintiffs to employ them as managers for five years. A draft agreement was prepared and submitted to the plaintiffs; they objected to some of its terms, and thereupon the directors of the defendants' company wrote out a paper modifying the draft agreement in some particulars, but concluding with the words "all other provisions as in draft." The plaintiffs agreed to the draft agreement as modified by this paper. The secretary of the defendants' company entered in the minute book a resolution that the plaintiffs having signified their willingness to undertake "the management of the company's works upon the terms of the draft agreement submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed." At the next meeting of the directors of the defendants' company the chairman signed the above resolution pursuant to the Companies Act, 1862, s. 67:—*Held*, in the Queen's Bench Division, by Mellor and Lush, JJ., that there was a valid contract within the Statute of Frauds, s. 4, by the defendants to employ the plaintiffs during five years: for the terms of the service were completely ascertained when the plaintiffs assented to the draft agreement as modified by the paper, and it was immaterial that the directors of the defendants' company intended the contract as finally arrived at to be afterwards "engrossed in duplicate, signed, sealed, and executed;" and the draft agreement and the paper modifying it might be identified by parol as the draft agreement referred to in the resolution entered in the minute book; and although the signature of the chairman was

FRAUDS, STATUTE OF—*continued.*
affixed to the minute book for the purpose of verifying the accuracy of the entry therein contained, pursuant to the Companies Act, 1862, s. 67, it nevertheless operated as an admission of the contract contained in the draft agreement and the paper, and was sufficient to satisfy the Statute of Frauds, s. 4.—By an order of reference made by consent, and before the coming into operation of the Judicature Acts, it was ordered that neither the plaintiffs nor the defendants should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opinion of the Court upon a special case stated by him. The Court gave judgment for the plaintiffs. The defendants appealed:—*Held*, in the Court of Appeal, that no appeal could be brought.—*Gumm* v. *Fowler*, (2 E. & E. 890; 29 L. J. (Q.B.) 189) observed upon. Jones *v.* The Victoria Graving Dock Company - - - - - C. A. 314

FRAUDULENT REPRESENTATION—As to effect of release - - - - 1
See Deed.

—— Chairman of company - - - 214
See Company. 1.

FREIGHT, PRO RATA - - - 423
See Ship. 5.

FREEHOLDERS—Bound by consent of homage of copyholders - - - - 433
See Common of Turbary.

GENERAL AVERAGE - - - 295
See Ship. 6.

GRANT OF TURBARY AND ESTOVERS - 433
See Common of Turbary.

GRATUITOUS CARTING - - - 254
See Railway Company. 1.

HABITUAL OR OCCASIONAL NEGLECT—Sending child to school - - - 397
See Elementary Education Act.

HACKNEY CARRIAGE - - - 279
See Master and Servant.

HERTFORD COLLEGE ACT, 1874 - - 590
See Universities Tests Act.

HIGHWAY—*Extra-Parochial Place—Indictment—Highway Parish*—25 & 26 *Vict. c.* 61, *s.* 32—"*Purposes of this Act*"—"*Parish separately maintaining its own Highways.*"] The 32nd section of 25 & 26 Vict. c. 61, does not constitute places formerly extra-parochial parishes subject to the common law liability to indictment for non-repair of highways. It only subjects them to the operation of that Act as highway parishes liable to be put into a highway district. The Queen *v.* The Inhabitants of Central Wingland - 349

—— Nuisance in - - - - 276
See Master and Servant.

HUSBAND AND WIFE—Larceny - - 307
See Larceny.

IDENTIFICATION—By parol of documents mentioned in signed documents - 314
See Frauds, Statute of.

IMMINENT RISK - - - - 295
See Ship. 6.

IMPOUNDING ANIMALS - - - 118
See Pound.

IMPLIED REPRESENTATION - - 331
See False Representation.

INDICTMENT - - - - 349
See Highway.

—— Accessory to murder - - - 311
See Accessory.

INFANT—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 25, *subs.* 10—*Parent and Child—Right of Father to the Custody of his infant Children.*] Since the passing of the Judicature Act, 1873, the Courts of Common Law have concurrent jurisdiction with the Courts of Equity with regard to the care and custody of infants; but, in the exercise of that jurisdiction, the rules of Equity are to prevail.—Before, however, the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that he has so conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential to their safety and welfare in some very serious and important respect, that the father's acknowledged rights should be interfered with.—Mere incontinence, or habits of intemperance, will not of itself justify the interference of the Court.—The affidavits of the mother and others, in answer to a rule for a habeas corpus by a father to remove his child (a boy of nine years) from the custody of the child's maternal grandfather, disclosing facts which shewed the applicant to be a person of intemperate and vicious life, and in the habit of using gross and disgusting language as well as personal violence to his wife,—the Court declined to interfere, the present custody of the child being unobjectionable. In re Goldsworthy - 75

INNKEEPER—*Duty to provide Entertainment—Inn—Traveller—Reasonable Excuse.*] The defendant was the proprietor of an hotel. Attached to the hotel and under the same roof and licence, but entered by a separate door from the street, was a refreshment bar, in which persons casually passing by obtained refreshments at a counter. The prosecutor, who was a householder living within twelve hundred yards, had been in the habit of coming to the bar with several large dogs, which had been found an annoyance to other guests; and letters had passed in which the defendant had objected to the dogs being brought into the bar, and the prosecutor had asserted his right to bring them. The prosecutor subsequently, while taking a walk for pleasure, went with one large dog to the bar and claimed to be served with refreshments, which the defendant refused him.—On an indictment charging the defendant, as an innkeeper, with refusing refreshment to the prosecutor:—*Held*, that he could not be convicted: first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveller; thirdly, because, had it been otherwise, the defendant had reasonable ground for his refusal. The Queen *v.* Rymer [C. C. R. 136

INVENTIONS, TWO - - - - 493
See PATENT.

IRON MINE—Poor-rate - - - 286
See POOR-RATE. 1.

IRREMOVABILITY - - - - 522
See POOR-LAW. 2.

JOINT ACTION—For several tort - - 496
See PRACTICE. 9.

JUDGE AT CHAMBERS - - - 171
See PRACTICE.

JURISDICTION — *Action for Rent of Premises situate abroad—Domicile of Parties—Act of State.*] Claim, stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station.—Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there: that the premises in question were constructed on land which was the property of the republic, and that the plaintiffs and defendants were joint concessionaires under the republic of certain easements appurtenant thereto. That the construction of the premises was directed by the government of the republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the republic powers of adjusting all rights arising out of the construction, and applicable to the claim of the plaintiffs, were vested in the government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that the republic had assumed jurisdiction over the plaintiffs' claim:—*Held*, on demurrer, that the defence was bad, as both parties to the action were within the jurisdiction of the English Courts, and the facts alleged did not shew that the Argentine Republic had exclusive jurisdiction over the claim. THE BUENOS AYRES AND ENSENADA PORT RAILWAY COMPANY *v.* THE NORTHERN RAILWAY COMPANY OF BUENOS AYRES [210

—— Companies Act, 1862, s. 35 - - 463
See COMPANY. 3.

—— Divisional Court—Application for new trial
See PRACTICE. 10. [605

JUSTICES, CASE STATED BY — 20 & 21 *Vict. c.* 43—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 305—*Authority to enter Premises.*] Justices have no power to state a case on refusing to make an order authorizing the local authority to enter premises under the Public Health Act, 1875, s. 305, inasmuch as this is not the determination of a complaint within 20 & 21 Vict. c. 43, s. 2. THE DISS URBAN SANITARY AUTHORITY *v.* ALDRICH - 179

—— *Costs—Application to strike out of the Paper—Absence of Jurisdiction.*] A case having been stated by justices under 20 & 21 Vict. c. 43, but the appellant not having complied with the conditions required by that Act, and there being consequently no jurisdiction to hear the case, the respondent applied by way of motion to strike the case out of the paper. Application granted with costs against the appellants. *Peacock* v. *The Queen* (4 C. B. (N.S.) 264) not followed with regard to the question of costs. THE GREAT NORTHERN AND LONDON AND NORTH WESTERN JOINT COMMITTEE *v.* INETT - - - - - 284

—— Review of decision of - - - 516
See MANDAMUS.

LANDLORD AND TENANT - - 575
See PRACTICE. 11.

LANDS CLAUSES ACT, 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 121 — *Compensation — Procedure—Tenant for Residue of a Term having less than one Year to run.*] By the Lands Clauses Consolidation Act, 1845, s. 68, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works," he may have compensation for the same "settled either by arbitration or by the verdict of a jury, as he shall think fit." By s. 121, if any lands required for the purposes of the special Act "shall be in the possession of any person having no greater interest therein than as a tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein," he shall be entitled to compensation, to be "determined by two justices in case the parties differ about the same."—The prosecutors were tenants of certain land, which they held for a term of two years; the defendants took possession under the provisions of the Lands Clauses Consolidation Act, 1845. At the time when possession of the land was taken by the defendants, the unexpired residue of the prosecutors' term was less than one year; they commenced proceedings under s. 68 to obtain compensation by arbitration:—*Held*, that the prosecutors were persons "having no greater interest . . . than as a tenant for a year or from year to year" within the meaning of s. 121; and that they ought to have taken proceedings before justices in order to determine the amount of compensation payable to them; and that they could not obtain compensation under s. 68. THE QUEEN *v.* THE GREAT NORTHERN RAILWAY COMPANY 151

2. —— (8 & 9 *Vict. c.* 18), *s.* 127—*Superfluous Lands—Land not in actual Use for Purposes of Undertaking.*] Where lands have been taken compulsorily under the powers of a railway Act, and retained by the company with the bonâ fide intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous lands within sect. 127 of the Lands Clauses Consolidation Act.—*Great Western Ry. Co.* v. *May* (Law Rep. 7 H. L. 283) distinguished. HOOPER *v.* THE GREAT WESTERN RAILWAY COMPANY - - - - - - 339

—— Ferry—Compensation for - - 224
See FERRY.

LARCENY — *Receiving — Husband and Wife — Adultery.*] A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. *Reg.* v. *Deer* (L. & C. Cr. C. 240; 32 L. J. (M.C.) 33) and *Reg.* v. *Featherstone* (Dears. Cr. C. 369; 23 L. J. (M.C.) 127) explained THE QUEEN *v.* KENNY - - - - C.C.R. 307

LIABILITY — Of guardians — Maintenance of lunatic - - - - 15
See LUNATIC.

—— Pound-keeper - - - - 118
See POUND.

—— Owner of premises - - - 389
See LOCAL GOVERNMENT ACTS.

LIABILITY OF SURETY - - - 209
See BANKRUPTCY.

LIBEL — Interrogatories - - - 524
See PRACTICE. 8.

LICENCE — Public-house - - 383, 403
See PUBLIC-HOUSE. 1, 2.

LIMITATIONS, STATUTE OF (3 & 4 *Wm.* 4, *c.* 27, *ss.* 2, 3) — *Fee Farm Rent — Discontinuance of Receipt — Payment of Rent by Person other than the Terre-Tenant.*] Certain lands which were subject to a fee farm rent were, in 1812, conveyed upon a sale by the then owner to the plaintiff's predecessor in title. From 1812 down to 1872 the rent was paid by the vendor and his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to, and so received the rent, were ignorant of the conveyance of the lands to the plaintiff's predecessor in title. In 1872, the successor in title of the vendor refused to continue the payments of rent, and the defendant, as the owner of the rent, thereupon demanded payment of the rent from the plaintiff, and on her refusal to pay it, distrained upon the land for the arrears. The plaintiff thereupon replevied, claiming that the defendant's title to the rent was barred by discontinuance of the receipt of the rent, under 3 & 4 Wm. 4, c. 27, ss. 2, 3, on the ground that the payments of rent since 1812 not being by the terre-tenant, there had been no receipt of the rent within that Act during such period:—*Held*, that there was no discontinuance of receipt of the rent; first, because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to the defendant or his predecessors in title; and, secondly, because under the circumstances it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, and the payments of rent from 1812 to 1872 were therefore made on behalf of the plaintiff and her predecessors in title; and that the defendant's title was therefore not barred. ADNAM *v.* THE EARL OF SANDWICH 485

LOADING AND UNLOADING — Undue preference in railway traffic - - - 254
See RAILWAY COMPANY. 1.

LOCAL GOVERNMENT ACTS (21 & 22 *Vict. c.* 98), *ss.* 62, 63 — *The Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 69 — *Sewering, Paving, &c. — Liability of Owner of Premises — Expenses incurred by Local Board — Notice of Apportionment — Demand, when necessary — Time within which summary Proceedings may be taken* — 11 & 12 *Vict. c.* 43, *s.* 11.] Where works are executed by a local authority for the improvement of a street under 11 & 12 Vict. c. 63, s. 69, and 21 & 22 Vict. c. 98, s. 63, and the expenses charged upon the owners of the premises fronting the street, it is necessary before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him, and the six months within which the summary proceedings must be taken, under 11 & 12 Vict. c. 43, s. 11, are to be reckoned from such notice of demand, and not from the notice of apportionment, which is not a sufficient demand. GRECE *v.* HUNT - - - - 389

2. —— *Election of Members — Counting of Votes — Decision of Chairman, when Conclusive* — 11 & 12 *Vict. c.* 63, *s.* 27; 35 & 36 *Vict. c.* 55, *sch. II., ss.* 51–54.] After the election of a local board, under 11 & 12 Vict. c. 63, the chairman proceeded, under s. 27, to ascertain the number of valid votes for each candidate, and to cast up the votes; and he made his certificate as to who were the candidates elected. On the trial of a quo warranto information against one of the successful candidates, it appeared that the chairman had, by mistake (1.), put down votes to one candidate which the voting papers shewed had been given for another; (2.) had omitted to reckon votes; and also (3.) had received as valid votes which were invalid, but as to which he had made no examination:—*Held*, affirming the decision of the Queen's Bench Division, that as to the first and second class of votes, the duty of the chairman was merely ministerial, viz., that of casting up the votes, and as to this his certificate could be impeached; but that as to the third class he had to exercise a judicial duty, and as to this therefore his certificate was conclusive THE QUEEN *v.* COLLINS - - - C.A. 30

3. —— (38 & 39 *Vict. c.* 55), *s.* 253, *and Sch.* 2, *Rule* 69 — *Election of Member of Local Board — Fabrication of Voting Paper — Penalty — "Party aggrieved" — Consent of Attorney General.*] At an election for a member of the local board at W., the appellant and M. were the only candidates; M. was declared to be elected, he having obtained ninety-four votes and the appellant eighty-nine. The appellant, without the consent of the Attorney General, preferred an information under the Public Health Act, 1875, Sch. 2, Rule 69, against the respondents, charging them with fabricating in part the voting paper of D., a person entitled to three votes at the election; but the justices dismissed it on the ground that the appellant was not a "party aggrieved" within the meaning of the Public Health Act, 1875, s. 253, and therefore that the consent of the Attorney General was requisite:—*Held*, that the dismissal of the information was wrong, for the appellant was a party aggrieved within the meaning of that statute. VERDIN *v.* WRAY - 608

LOCAL GOVERNMENT ACTS, 1858—*continued.*
—— Case stated by justices - - - 129
See Case stated by Justices. 1.

LUNATIC—*Liability of Guardians—Lunatic remaining more than One Year in Asylum*—16 & 17 *Vict. c.* 97, *s.* 96.] By 16 & 17 Vict. c. 97, s. 96, it shall be lawful for the justice by whom any pauper lunatic is sent to an asylum, registered hospital, &c., under the powers of this Act, or for any two justices of the county or borough, &c., to make an order upon the guardians of the union or parish, or overseers of the parish (if not in a union or under a board of guardians), from which such lunatic is or has been sent for confinement, for payment to the treasurer, officers, or proprietor of the asylum, &c., of the reasonable charges of the lodging, maintenance, &c., of such lunatic in such asylum, hospital, &c., and any such order may be retrospective or prospective, or partly retrospective and partly prospective. By s. 97, two justices may inquire into and adjudge the settlement of a pauper lunatic, and order the guardians of the union or overseers of the parish in which he is adjudged to be settled to pay the guardians of any union or overseers of any parish money paid to the treasurer, officer, &c., of the asylum, &c., for lodging, &c., incurred within twelve months previous to the date of the order: —*Held*, that under s. 96 an order may be made for the payment of the expenses of the maintenance of a lunatic for a period of more than twelve months previous to the date of the order. Finch *v.* The Guardians of York Union - - 15

MANDAMUS—*Justices' Review of Decision of—Conviction quashed on Point of Form—Preliminary Objection*—5 *Geo.* 4, *c.* 83, *s.* 4.] The appellant was convicted by a metropolitan police magistrate under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . . using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects." The conviction described the offence as "unlawfully using certain subtle craft, means and device" (omitting the words "by palmistry or otherwise"). Upon appeal to the Middlesex Sessions, the proceedings commenced with an objection from the appellant that the omission of the above words made the conviction bad. The justices, after hearing the point argued, retired, and on their return the assistant judge gave what purported to be the decision of the sessions, quashing the conviction on the objection taken to it. Upon application for a mandamus to the sessions to hear the appeal on the merits, it was proposed to shew by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of a majority of the justices forming the Court, and that after such opinion had been communicated to him, he persisted in giving his decision as that of the sessions:—*Held*, first, that the order of sessions having been duly recorded, it was too late to inquire whether it did or did not represent the opinion of the majority of the justices. Secondly, that the decision upon the form of the conviction was not a decision upon a preliminary matter, but a hearing and adjudication upon the merits, which upon a mandamus could not be reviewed. The Queen *v.* The Justices of Middlesex - - - - - - 516

MANDAMUS—*continued.*

MANOR - - - - - 433
See Common of Turbary.

MARINE INSURANCE—*Partial Loss—Cost of Repairs—Allowance of one third New for Old—Suing and Labouring Clause—Salvage Expenses.*] The defendant insured the plaintiff for 1200*l.* upon a ship valued at 2600*l.* The ship encountering rough weather suffered sea damage, and incurred salvage expenses to the amount of 519*l.* She was repaired, and the result of the repairs, the ship being an old one, was to make her more valuable when repaired than she was at the time of the insurance. The defendant, in an action on the policy to recover for a partial loss, contended that he could not be liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of salvage and general average expenses, and that the depreciation in value of the ship by sea damage, not the cost of the repairs, was the measure of the partial loss:—*Held*, that the cost of repair, making the usual deduction of one third new for old, was the measure of the loss if the shipowner elected to repair, and consequently that the assured was entitled to recover such cost of repair up to the amount insured for, even although the loss so estimated might amount to more than a total loss with benefit of salvage:—But *held*, that the assured could not recover under the suing and labouring clause in respect of a proportion of the salvage expenses over and above the 1200*l.*, because, the damage done to the ship being so great as already to exhaust the policy and the assured not having abandoned, the salvage expenses did not enure to the benefit of the underwriter. Lohre *v.* Aitchison - - - - 501

MARKETS CLAUSES ACT, 1847 (10 & 11 *Vict. c.* 14), *s.* 13—*Exmouth Market Act*, 1867 (30 *Vict. c. xix.*), *s.* 20.] The Exmouth Market Act, 1867 (30 Vict. c. xix.), which incorporates the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), by s. 20, enacts that no unlicensed person shall sell in any open place within the limits of the market, not being the new market place or his own dwelling house or shop, any articles, &c. —The respondent sold articles of the description mentioned in the Act in a skittle-ground let to him for two days. The place where the sale took place was covered with a roof and inclosed, but had a door leading into the street:—*Held*, that the place of sale was not the respondent's shop within the exception in the Act. Hooper *v.* Kenshole - - - - - 127

MARRIED WOMAN—Leaving children chargeable to parish - - - 131
See Vagrancy Act.

MASTER AND SERVANT—*Hackney Carriage—Cab Proprietor and Driver, Relation between—Bailor and Bailee—Negligence—Scope of Employment.*] The plaintiff was run over and sustained injuries through furious driving on the part of a cab driver, and brought his action for such injuries against the proprietor of the cab. The arrangement between the proprietor and the

MASTER AND SERVANT—*continued.*

driver was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16*s.* for the cab; all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred, the driver was on his way back with the cab to the stables of the proprietor intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened:—*Held*, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was intrusted to him, as a master for the acts of his servant, and that the driver was at the time of the accident so acting.—*Powles* v. *Hider* (6 E. & B. 207; 25 L. J. (Q.B.) 331) followed. Venables *v.* Smith - - - - - 279

2. —— *Negligence—Coal Grate in Highway.*] The carman of the defendant, a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries:—*Held*, in an action against the defendant for negligence, that he was responsible.—*Pickard* v. *Smith* (10 C. B. (N.S.) 470) considered. Whiteley and Wife *v.* Pepper - - - 276

"MATERIAL PARTICULAR" - - 611
See Bastardy.

MEASURE OF DAMAGES - - - 102
See Sale of Goods. 2.

MEETING - - - - - 26
See Company. 2.

MEMORY—Refreshing - - - 296
See Evidence.

METROPOLIS MANAGEMENT ACT, 1855 (18 & 19 *Vict.. c.* 120), *ss.* 42, 125—*Duty created by Statute—Remedy by Action—Neglect to remove Refuse.*] By the Metropolis Management Act, 1855, s. 42, the defendants were constituted a body corporate, with power to sue and liability to be sued. By s. 125, vestries are required to employ a sufficient number of persons, or to contract with any company or persons for removing all dirt, ashes, rubbish, and filth within their parishes. The plaintiffs, the guardians of a union, were possessed of a workhouse situate within the defendants' parish. The defendants refused to remove from it the dirt, ashes, rubbish, and filth there collected; the plaintiffs were in consequence obliged to remove the same and thereby incurred expense:—*Held*, that an action was maintainable by the plaintiffs to enable them to recover from the defendants the expense incurred by them in removing the dirt, ashes, rubbish, and filth from

METROPOLIS MANAGEMENT ACT, 1855—*contd.*

the workhouse. The Guardians of the Poor of the Holborn Union *v.* The Vestry of the Parish of St. Leonard, Shoreditch - 145

MISSTATEMENT—Nature of goods - 301
See False Pretences. 2.

MONEY—Received under treaty from sovereign on account of debts due to British subjects - - - - - 69
See Petition of Right.

MOTION FOR JUDGMENT - - - 177
See Practice. 6.

MUNICIPAL CORPORATIONS ACT (5 & 6 *Wm.* 4, *c.* 76). *s.* 117—*Borough "liable to contribute in whole or in part to County Rate"—District liable to County Rate added to Borough by* 2 & 3 *Wm.* 4, *c.* 64.] By the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the cost arising out of the prosecution of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests; and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county; and shall make an order on the council of every such borough for the payment of such proportion of such sums as would have been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this Act had not passed upon such borough as the same shall be bounded according to the provisions of this Act.—Before the passing of 2 & 3 Wm. 4, c. 64, the borough of New Windsor included part of the parish of Clewer in Berks, which was exempt from the county rate, and on the passing of that Act a further part of the parish of Clewer, which part up to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough were made co-extensive with those of the parliamentary borough. The borough has a separate court of quarter sessions, and a charter containing a non-intromittant clause:—*Held*, affirming the judgment of the Queen's Bench Division, that the borough of New Windsor was liable to contribute to the account for "other purposes" in respect of the part of the parish of Clewer which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with county rate. The Queen *v.* Monck - - - C. A. 544

MURDER - - - - - 311
See Accessory.

MUSIC—*Dancing—Entertainment of like kind—Skating Rink—Band of Music*—25 *Geo.* 2, *c.* 36, *s.* 2.] The defendant kept a skating rink within twenty miles of London. The rink was inclosed

MUSIC—*continued.*
by a wall, and was partly roofed with canvas and partly open to the air. It was open for skating in the day time and in the evening. In the day time there was no music. In the evening a band played operatic and dance music, while the skaters skated. The defendant had no licence under 25 Geo. 2, c. 36 :—*Held*, that the defendant might properly be convicted of keeping a place for public entertainment of a like kind to music and dancing without a licence.—*Semble*, he might also be convicted of keeping a place for public music, without a licence. The Queen *v.* Tucker [C. C. R. 417

NEGLECT TO REMOVE REFUSE - - 145
See Metropolis Management Act.

NEGLIGENCE—*Railway Company—Evidence—Station.*] A railway train drew up at a small station with the engine and part of one of the carriages beyond the platform. A passenger in that carriage, having parcels in her hands, opened the door and waited on the iron step some time for assistance; but, no one coming to assist, she, fearing that the train would move on, tried to alight by getting on to the footboard, and in so doing fell and injured herself, for which injury she brought an action against the company :—*Held*, affirming the decision of the Court of Queen's Bench, that, under the circumstances, there was evidence of negligence which should have been left to the jury.—Per Mellish, L.J. : Railway companies are bound to find, at every station, reasonable means for passengers to alight. —*Siner* v. *Great Western Ry. Co.* (Law Rep. 4 Ex. 117) distinguished. Robson *v.* The North Eastern Railway Company - - C. A. 85
—— - - - - - - 276, 279
See Master and Servant. 1, 2.

NEGOTIABLE INSTRUMENT—*Scrip—Shares in Banking Company—Estoppel.*] Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker, in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery :—*Held*, on the authority of *Goodwin* v. *Robarts* (1 App. Cas. 476 ; Law Rep. 10 Ex. 337), that the defendants were entitled to the scrip certificates as against the plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere delivery, and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a bonâ fide holder for value, was estopped from denying that they were so transferable. Rumball *v.* The Metropolitan Bank - 194

NEW ENDOWMENT WITH RELIGIOUS TEST
See Universities Test Act. [591

NOTICE—Amount demanded - - 406
See Railway Company. 2.
—— Apportionment - - - 389
See Local Government Acts.
—— Dishonour of bill - - - 23
See Bill of Exchange.
—— Objection—Patent - - - 493
See Patent.

OBSCENE PUBLICATION—*Absence of Corrupt Motive—Indictment—Omission to set out Words charged as Obscene—Practice.*] In an indictment for the publication of an obscene book, the fact that the book is described by its title only, without setting out any of the words charged as obscene, is no ground for a motion to quash the indictment or arrest the judgment.—*Semble*, that such omission of the words charged as obscene is not open to objection by demurrer or otherwise. The Queen *v.* Bradlaugh - - - 569

OFFICIAL LIST OF STOCK EXCHANGE - 48
See Conspiracy.

ORDER—To have point of law decided before issue of fact - - - - 67
See Practice. 12.

PARENT AND CHILD - - - 75
See Infant.

PARISH—Separately maintaining its own highway - - - - - 349
See Highway.

PARTIAL LOSS - - - - 501
See Marine Insurance.

PARTIES - - - - - 496
See Practice. 9.

"PARTY AGGRIEVED" - - - 608
See Local Government Acts. 2.

PATENT—*Notice of Objection—Two Inventions—15 & 16 Vict. c. 83, s. 41.*] Under notice of objection by a defendant, to an action for infringing a patent, that the invention was not new, the defendant can at the trial shew that one of two inventions described in the specification is not new, and that the patent is therefore bad. Sugg *v.* Silber - - - - C. A. 493

PAYMENT INTO COURT—Pleading - 615
See Practice. 14.

PAYMENT OF RENT—By person other than the terre tenant - - - - 485
See Limitations, Statute of.

PENALTY—Fabrication of voting paper - 608
See Local Government Acts. 2.

"PENALTY OR FORFEITURE" - - 406
See Railway Company. 2.

PERJURY—*Evidence of Institution of Suit in which Perjury committed—Rules of Supreme Court, Order V., Rule 7, Order XLI., Rule 1.*] Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, the existence of the action is sufficiently proved by the production, by the officer of the Court, of the copy writ filed under Order V., Rule 7, and the copy pleadings filed

PERJURY—*continued.*
under Order XLI. Rule 1, of the Rules of the Supreme Court. The Queen *v.* Scott **C. C. R. 415**

"PERSON" - - - - - **131**
See Vagrancy Act.

PERSONAL LIABILITY - - - **355**
See Auction.

PETITION OF RIGHT—*Treaty by the Crown—With a Foreign Sovereign—Money received under the Treaty from Foreign Sovereign on Account of Debts due to British Subjects—Prerogative of the Crown.*] By a treaty between the Queen of England and the Emperor of China, the Emperor agreed to pay to the British government 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent being largely indebted to British subjects. The money having been received by the British government:—*Held*, affirming the judgment of the Queen's Bench Division, that a petition of right would not lie by one of the British subjects to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants, on the grounds: 1. That there was nothing in the terms of the treaty to make the Crown agent or trustee in respect of any specific sum for the suppliant or any other person: 2. That in all that relates to the making and performing of a treaty with another sovereign, the Crown cannot be either a trustee or agent for any subject. Rustomjee *v.* The Queen [C. A. 69

PLEADING - - - **496, 498, 615**
See Practice. 9, 13, 14.

POOR LAW—*Adjudication of Settlement—Order of Removal unappealed against—Proof of Execution of Order of Removal—Acknowledgment by Relief.*] Where after an order of removal the parish of settlement acquiesces in it by relieving the pauper in the removing parish, the order, though not executed by actual removal, is, upon proof that it was unappealed against, a conclusive adjudication against all persons of the settlement of the pauper at the date of the order. Clifton Union *v.* Overseers of Liverpool - - **540**

2. —— *Removal of Pauper—Irremovability—Break of Residence*—9 & 10 *Vict. c.* 66, *s* 1.] The pauper resided in a parish in the respondent union for fifteen years continuously, when he became unable to work, and became chargeable to the respondent union. He continued to reside in the parish and to receive relief for two years and a half more, when having received notice to quit the premises which he occupied, he arranged to take a house in a parish within another union, and removed into the house with his family and slept there one night, not knowing that he was removing into another union. On the next day he was told that his residence in the respondent union had been broken, and at once returned to a house in a parish within that union:—*Held*, that his removal under the above circumstances was such a break in his residence as to destroy his status of irremovability. Newark Union *v.* Glandford Brigg [522

3. —— *Settlement by Residence—Removal*—39 & 40 *Vict. c.* 61, *s.* 34.] The 34th section of 39 & 40 Vict. c. 61 enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise," &c.:—*Held*, that a person who had resided in a parish for a term of three years, but whose residence therein had ended before the passing of the Act, did not acquire a settlement therein under the section. The Queen *v.* Ipswich Union **269**

POOR RATE—*Iron Mines—Rating Act*, 1874 (37 & 38 *Vict. c.* 54), *ss.* 3, 8, 10—"*Specific Contract*" *to pay Rate.*] A covenant, in a lease of iron mines, to pay a certain rent "free of all rates, taxes, and deductions whatsoever, parliamentary, parochial, or of any other nature," is not a "specific contract to pay the poor-rate, in the event of the abolition of the exemption," of iron mines, within s. 8 of the Rating Act, 1874 (37 & 38 Vict. c. 54); and the lessee is therefore entitled under that section to deduct half the poor-rate from the rent. The Duke of Devonshire *v.* The Barrow Hæmatite Steel Company - - **C. A. 286**

2. —— *Rateable Occupation—Licence in Nature of Easement—Advertising Hoarding.*] Where a person, in consideration of a yearly payment, had permission from the owner of land to affix to such land hoardings for advertising purposes, and such hoardings were accordingly affixed, but not in such a way as to necessitate any disturbance of the soil if they were removed, or as to indicate any intention on the part of the owner that there should be a permanent occupation of any part of the land by the person erecting the hoarding:—*Held*, that such person was not rateable as an occupier of an "advertising station," and that his name was therefore wrongly inserted in the supplemental valuation list of a metropolitan parish. The Queen *v.* St. Pancras Assessment Committee - - - - - - **581**

POUND—*Impounding Animals without Food and Water—Liability of Pound-keeper*—12 & 13 *Vict. c.* 92, *s.* 5.] Sect. 5 of 12 & 13 Vict. c. 92,—by which every person who shall impound, or cause to be impounded or confined, in any pound or receptacle of the like nature any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal,—does not apply to the keeper of the pound in which the animal is impounded. Dargan *v.* Davies - - **118**

PRACTICE—*Appeal—Setting down Motion—Costs—Order LVIII., Rule* 8.] Where notice of motion of appeal is given, but the party giving it neglects to take the proceedings before the officer of the court directed by Order LVIII., Rule 8, and the matter is not in the court paper of the day, the other party ought not to appear, but may make a substantive application for his costs of the motion. Webb *v.* Mansel - - - **C. A. 117**

2. —— *Appeal—Judicature Acts*, 1873 & 1875, 36 & 37 *Vict. c.* 66, *ss.* 19, 47; 38 & 39 *Vict. c.* 77, *s.* 19, *Order LXII.*] A rule for a certiorari having

PRACTICE—*continued.*

been obtained in the Queen's Bench Division to bring up a summary conviction by justices, for the purpose of quashing it on the ground of want of jurisdiction, the Court discharged the rule. On appeal:—*Held*, that the case was within the last clause of s. 47 of the Judicature Act, 1873, as a judgment of the High Court in a criminal matter, and that there was therefore no appeal. The Queen *v.* Fletcher - - - C. A. 43

3. —— *Appeal in Criminal Cases—Judicature Acts*, 1873 *and* 1875, 36 *&* 37 *Vict. c.* 66, *ss.* 19, 47; 38 *&* 39 *Vict. c.* 77, *s.* 19—*Costs in Information for Libel under* 6 *&* 7 *Vict. c.* 96, *s.* 8.] Under the Judicature Acts, 1873 and 1875, there is no appeal to the Court of Appeal in a criminal case except for error on the record.—By 6 & 7 Vict. c. 96, s. 8, on judgment for the defendant in an information for libel he is entitled to recover from the prosecutor his costs, to be taxed by the officer of the court before which the information is tried. The master of the Crown office having taxed the defendant his costs according to the usual practice under a side-bar rule, the defendant appealed to the Queen's Bench Division against the taxation, and that Division affirmed the taxation. On appeal to the Court of Appeal:—*Held*, that by the latter part of s. 47 of 36 & 37 Vict. c. 66, the general right of appeal given by s. 19 from any judgment of the High Court is excepted in any criminal cause or matter; that the costs were the consequences of the judgment, and were within the exception; and that the Court of Appeal had no jurisdiction. The Queen *v.* Steel. C. A. 37

4. —— *Costs—Jurisdiction of Judge who tried Action—Judge at Chambers—Order LV.; Order LVII., Rule* 6—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 39.] By Order LV., where an action is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action is tried or the Court shall otherwise order. By Order LVII., Rule 6, a Court or a judge shall have power to enlarge the time appointed by these rules for doing any act. By s. 39 of the Judicature Act, 1873, any judge of the High Court may exercise any jurisdiction of the Court exercised before the Act by a judge at chambers. A jury returned a verdict for a small amount beyond a sum paid into court; no application as to costs was made at the trial; but some time afterwards the judge who tried the action, sitting at chambers, made an order depriving the plaintiff of costs from the time of the payment into court. On appeal, the Divisional Court set aside the order for want of jurisdiction. On appeal to the Court of Appeal:—*Held*, that the judge had no jurisdiction: Either, 1. As the judge who tried the action, because no application had been made at the trial as required by Order LV.; and Order LVII., Rule 6, did not apply to the case. Or, 2. As the judge at chambers, because Order LV. expressly confined the power to the Court, and s. 39 did not apply, as no such power existed before the Act. Baker *v.* Oakes - C. A. 171

5. —— *Costs—Judicature Act*, 1875, *Order LV.—Reference—Common Law Procedure Act*, 1854, *ss.* 3-6—*Order of Reference silent as to Costs.*] A cause having been referred to a master, under the provisions of the Common Law Procedure Act, 1854, as a matter of account, and the order of reference being silent as to the costs, the Court refused an application, under Order LV., for an order for costs on behalf of the party in whose favour the award of the master was made. Wimshurst, Hollock, & Co. *v.* The Barrow Shipbuilding Company - - - - 335

6. —— *County Court—Action ordered to be tried in County Court—Certificate of Result of hearing Cause—Motion for Judgment—Order XXXVI., Rule* 22; *Order XL., Rule* 1—*County Courts Act*, 1856 (19 *&* 20 *Vict. c.* 108), *s.* 26.] Orders XXXVI. and XL. do not repeal the enactment in 19 & 20 Vict. c. 108, s. 26, by which, where a cause is ordered to be tried in a county court, the registrar is to certify the result of the trial to the superior Court, and judgment is to be signed according to such certificate; and no motion for judgment is necessary. Scutt *v.* Freeman - - - - 177

7. —— *Discovery—Affidavit of Documents—Action upon Marine Policy—Stay of Proceedings until Affidavit has been made by a person not party to the Action and not within Jurisdiction.*] In an action upon a policy of marine insurance the defendant is not entitled to have the proceedings stayed until the plaintiff has obtained an affidavit of documents from a person, who is not a party to the action and is not within the jurisdiction of the Court and is not under the plaintiff's control; and it is not material that the plaintiff derives his title to the subject-matter of insurance through the person from whom the affidavit is sought. Fraser *v.* Burrows - - - - - 624

8. —— *Discovery — Interrogatories — Libel, Questions as to Publication of—Supreme Court of Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *subs.* 11—*Supreme Court of Judicature Act*, 1875, *Order XXXI., Rules* 1, 5.] Interrogatories asking the defendant whether he has composed or published an alleged libel are objectionable, and will be struck out without requiring the defendant to object to them by way of answer. Atherley *v.* Harvey - - - - - - 524

9. —— *Joint Action for several Tort—Joint Action for Libel—Parties—Order XVI., Rule* 1.] Under order XVI., Rule 1, an action of libel may be brought by two or more persons jointly, although they are not in partnership or otherwise jointly interested; and in such a joint action a single verdict of 40*s.* having been returned for the plaintiffs, the Court of Appeal refused, on the motion of the defendant, to disturb the verdict. Booth *v.* Briscoe - - - C. A. 496

10. —— *New Trial—Action commenced in Chancery Division—Application—Divisional Court—Appellate Jurisdiction Act*, 1875 (39 *&* 40 *Vict. c.* 50), *s.* 17—*Order XXXVI., Rule* 16; *Rules of Court, December*, 1876, *Order XXXIX., Rule* 1; *Order LVII. A., Rule* 1.] Where an action commenced in the Chancery Division is tried by jury before a judge of the Common Law Division, application to set aside the verdict, or for a new trial, cannot be made to a Divisional Court, but must be made to the judge before whom the case

PRACTICE—*continued.*

was tried. Hunt *v.* The City of London Real Property Company [reversed on appeal, November, 1877] - - - - - 605

11. —— *New Trial—Application on ground of Surprise—Surrender of Term by operation of Law—Landlord and Tenant—Rules of Court, December*, 1876, *Order XXXIX., Rule* 1.] After a trial by a judge without a jury any application for a new trial must be made to the Court of Appeal under Order XXXIX., Rule 1, whatever the ground of it may be.—Plaintiffs let a house to defendant for seven years from Lady Day, 1868. Defendant entered and occupied till Michaelmas, when he left England for America. He left the keys with an agent to dispose of the house if he could, if not, to make the best bargain he could with plaintiffs for the surrender of the term. The agent was unable to find a tenant, and gave the keys in December, 1868, to plaintiffs. They employed a house agent to let the house, and he put up bills in the house and advertised it to let, but the house was not let till Lady Day, 1872, when a new tenant went in. In 1870, for a short time, some workmen of plaintiffs' occupied two rooms in the house for the purpose of plaintiffs' saddlery business. Plaintiffs having sued defendant for rent from Michaelmas, 1868, to Lady Day, 1872: —*Held*, that there had been no possession of the house by plaintiffs so inconsistent with the continuance of defendant's term as to estop plaintiffs from alleging the continuance of it, so as to effect a surrender of the term by operation of law. Oastler *v.* Henderson - - C. A. 575

12. —— *Order to have Point of Law decided before Issues of Fact—Order XXXIV., Rule* 2.] A judge has power, under Order XXXIV., Rule 2, after writ and appearance, and before statement of claim, to order a point of law to be decided by statement of special case or otherwise.—The Court of Appeal will not interfere with the discretion of the Court below, except in an extreme case. The Metropolitan Board of Works *v.* The New River Company - - - C. A. 67

13. —— *Pleading—Counter-claim, who entitled to—Person named in Defence as Party to a Counter-claim—Judicature Act*, 1873, *s.* 24, *subs.* 3—*Judicature Act*, 1875, *Order XXII., Rule* 8.] A person, named in a defence as a party to a counter-claim thereby made, cannot counter-claim against the defendant. Street and Edmunds *v.* Gover. Gover *v.* Street, Edmunds, and Potts - 498

14. —— *Pleading—Supreme Court of Judicature Act*, 1873, *Order XIX., Rule* 4; *Order XXVII., Rule* 1—*Embarrassing Defence—Equitable Defence—Mode of stating Facts relied on by Party pleading.*] Where in an action brought in the Queen's Bench, Common Pleas, or Exchequer Division, the defendant relies upon such a defence as before the Supreme Court of Judicature Acts, 1873 and 1875, was deemed equitable, he is entitled (subject to the modifications introduced by those statutes) to state the facts in his pleading in such manner as they might have been stated in an answer to a bill in the Court of Chancery; and a defence stating many distinct facts which, taken as a whole, would in equity have constituted ground for relief against the action is not liable

PRACTICE—*continued.*

to be amended or struck out as embarrassing under Order XXVII., Rule 1. Heap *v.* Marris [630

15. —— *Pleading—Supreme Court of Judicature Act*, 1875, *Order XXVII., Rule* 1; *Order XXX., Rule* 1—*Embarrassing Defence—Payment into Court and Denial of Plaintiff's right to sue pleaded to same part of Statement of Claim—Action for Nuisance raising Question of Title.*] The Supreme Court of Judicature Act, 1875, Order XXX., Rule 1, does not permit a defendant in an action for nuisance, raising a question of title, to plead payment into court and to deny the plaintiff's right of action in respect of the same part of the statement of claim; and if he so pleads, the statement of defence will be amended as embarrassing under Order XXVII., Rule 1. — *Quære*, whether in any kind of action the defendant can in respect of the same portion of the statement of claim pay money into court and deny the plaintiff's right to sue? Spurr *v.* Hall - 615

16. —— *Trial before Official Referee—Application for New Trial—Evidence of what took place at Trial—Supreme Court of Judicature Act*, 1873, *ss.* 58, 59—*Supreme Court of Judicature Act*, 1875, —*Order XL., Rules* 5, 6.] Upon a motion to set aside or vary the judgment in a case tried before an official referee under the Supreme Court of Judicature Act, 1873, ss. 58, 59, an affidavit, or some evidence of what took place at the trial, must be furnished to the Court. Stubbs *v.* Boyle - - - - - - 124

17. —— *Writ specially indorsed — Signing final Judgment—Order XIV., Rule* 1—*Affidavit—Corporation.*] Where a writ is specially indorsed under Order III., Rule 6, but the plaintiffs are a corporation, an order calling upon the defendant to shew cause why final judgment should not be signed, under Order XIV., Rule 1, cannot be obtained, because that rule requires an affidavit to be made by the plaintiff himself as to his own belief that there is no defence to the action; and an affidavit by an officer of the corporation is not sufficient. Bank of Montreal *v.* Cameron [C. A. 536

PRELIMINARY OBJECTION - - 516
See Mandamus.

PREPARATION OF VALUATION LIST - 199
See Valuation (Metropolis) Act.

PREROGATIVE OF THE CROWN - - 69
See Petition, Right of.

PRESCRIPTION - - - - 290
See Sea-wall.

PROHIBITION—*Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 8, 16—*Disqualification of Bishop—Acceleration of Right to Patronage—Requirement as to Place of hearing Cause, how far directory.*] The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the provincial courts of Canterbury and York. By s. 8, a representation under certain circumstances may be made to the bishop of illegal acts or omissions on the part of any incumbent within his diocese; and by s. 9, if the bishop is of opinion that proceedings should be taken on the representation, he

PROHIBITION—*continued.*
shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster. By s. 16, if any bishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made . . . . the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation; and if any archbishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made . . . . the Crown may appoint an archbishop or bishop to act in the place of such archbishop in all matters thereafter arising in relation to such representation.—D. was rector of the united benefices of St. Vedast and St. Michael le Querne. The right of presentation to these benefices was first vested alternately in the Archbishop of Canterbury and the Dean and Chapter of St. Paul's, but afterwards, during D.'s incumbency, the alternate turn or right of patronage then belonging to the Dean and Chapter of St. Paul's was vested in the Bishop of London and his successors. A representation against D., under s. 7, was sent to the Bishop of London, and was by the bishop duly transmitted to the Archbishop of Canterbury. The archbishop thereupon, by instrument of requisition, required the judge to hear the matters of the representation "at any place in London or Westminster (or within the diocese of London), as you may deem fit." The judge heard the case in the public library at Lambeth Palace, which, though in the province of Canterbury, is neither in London, Westminster, nor the diocese of London, and gave judgment against D., who had notice of the proceedings, but did not appear. A monition, and subsequently an inhibition, were issued against D., and his benefice was sequestered. D. did not know that the patronage of the living had been transferred to the bishop until after the sentence had been given against him and the monition issued. After the sequestration and nine months after the sentence, he applied for a prohibition to the Arches Court:—*Held*, that the prohibition must be granted, for the bishop was patron of the benefices within the meaning of s. 16, and was disqualified from acting in the matters of the representation, and D. had not acquiesced in the proceedings, and his application for a prohibition was not too late.—*Quære*, whether the place of trial being neither in the diocese, nor in London nor in Westminster, the proceedings were on that account void. Serjeant *v.* Dale - - 558

PROPERTY, PASSING OF - - - - 96
See Sale of Goods. 3.

PUBLIC-HOUSE—35 & 36 *Vict. c.* 94, *s.* 12—"*Found drunk on Licensed Premises*"—*Licensed Person found drunk on his own Licensed Premises after the Premises are closed.*] The term "licensed premises," as used in the Licensing Act, 1872, s. 12, means licensed premises while they are open to the public for the purposes of the license; consequently a licensed person who is found drunk on licensed premises in his own occupation, after licensed hours and when the premises are closed to the public, is not liable to a penalty under s. 12. Lester *v.* Torrens - - 403

2. —— *License to sell off the Premises—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9—*Sale of Wine in Grocer's and Draper's Shop—Wooden Case of Wine closed after prohibited Hours.*] The occupier of a draper's and grocer's shop, who is licensed to sell in the same shop wines and spirits not to be consumed on the premises, cannot be convicted under the Licensing Act, 1874 (37 & 38 Vict. c. 49), ss. 3, 9, for keeping open premises for the sale of intoxicating liquors after prohibited hours, upon mere proof that the shop is kept open after the prohibited hours, without any sale or exposure for sale of intoxicating liquor.—The appellant was charged under 37 & 38 Vict. c. 49, ss. 3, 9, with keeping open premises (elsewhere than in the metropolitan district), for the sale of intoxicating liquors by retail after ten o'clock in the evening. It appeared that he occupied a shop where he sold drapery, grocery, and wines and spirits not to be consumed on the premises. One evening, after ten o'clock, his shop was found open. There was no proof of any sale or exposure for sale of intoxicating liquors aften ten o'clock, nor that liquors were then kept in any other place in the shop except in a large wooden case closed with shutters and a lock, which was standing in the shop with a printed notice on it, informing customers that wines and spirits could not be supplied after ten o'clock in the evening:—*Held*, that he was not liable, for it must be taken that the premises, as regarded the sale of intoxicating liquors, were bonâ fide closed at ten o'clock. Tassell *v.* Ovenden - - - - - 383

PUBLIC WORSHIP REGULATION ACT, 1874
See Prohibition. [588

QUESTION OF TITLE - - - 463
See Company. 3.

RAILWAY AND CANAL TRAFFIC ACT, 1854
See Railway Company. 1. [254

RAILWAY CLAUSES ACT - - - 224
See Ferry.

RAILWAY COMPANY—*Gratuitous Carting—Undue Preference—Loading and unloading of Customer's Goods, in order to prevent Traffic from passing over other Railway—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 90—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.] The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway.—The plaintiff's premises were not connected with the M. Railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway, and to divert some portion of it to their own line, the defendants carted goods gratuitously between their station at B.

RAILWAY COMPANY—*continued.*
and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart goods gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before-mentioned the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:—*Held*, that the gratuitous carting, loading, and unloading of the goods for the three firms was an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same. Evershed *v.* The London and North Western Railway Company - - - - - - 254

2. —— *Notice of Amount demanded—By-law—"Penalty or Forfeiture"*—8 *Vict. c.* 20, *s.* 145.] A by-law made by a railway company imposed upon a passenger failing or refusing to produce his ticket the liability to pay the amount of the fare from the station whence the train, by which such passenger travelled, had originally started:—*Held*, that there must be a demand of the specific sum payable in respect of such fare, in order to enable the company to recover it:—*Semble*, that such sum is a penalty or forfeiture within 8 & 9 Vict. c. 20, s. 145.—*Chilton* v. *London and Croydon Ry. Co.* (16 M. W. 212) discussed. Brown *v.* The Great Eastern Railway Company - 406

—— - - - - - - - 85
See Negligence.

RAPE—*Consent—Submission—Carnal Connection under Pretence of Surgical Operation.*] The prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner:—*Held*, that the prisoner was guilty of rape.—*Reg.* v. *Barrow* (Law Rep. 1 C. C. 156) questioned. The Queen *v.* Flattery - - - - - C. C. R. 410

REASONABLE EXCUSE - - - 136
See Innkeeper.

RECEIPT ON ACCOUNT OF MASTER - 141
See Embezzlement.

RECEIVING - - - - - - 307
See Larceny.

RECTIFICATION OF REGISTER - - 463
See Company. 3.

REFERENCE - - - - - - 314
See Frauds, Statute of.

—— Costs - - - - - - 335
See Practice. 5.

—— To arbitrator - - - - 371
See Sessions.

REFRESHING MEMORY - - - 296
See Evidence.

REMEDY BY ACTION - - - 145
See Metropolis Management Act.

REMOVAL OF PAUPER - - 522, 540
See Poor Law. 1, 2.

RENEWAL OF REGISTRATION OF BILL OF SALE - - - - 361
See Bills of Sale Act.

RENT - - - - - - - 189
See Use and Occupation.

RES JUDICATA — *Award of Compensation by Magistrate for Damages caused by furious driving a bar to further proceedings—6 & 7 Vict. c.* 86, *s.* 28.] An award of compensation by a magistrate against the driver of a hackney or metropolitan stage carriage upon an information for furious driving, under 6 & 7 Vict. c. 86, s. 28, is a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries.—If the party injured accepts such compensation he is barred from further proceedings, even where he did not lay the information or, in the first instance, request the magistrate to award compensation. Wright *v.* The London General Omnibus Company - - - - 271

RESOLUTION—To release vendor from liability
See Company. 1. [214

RESTITUTION OF PROPERTY - - 96
See Sale of Goods. 3.

RIGHT OF FATHER TO THE CUSTODY OF HIS CHILDREN - - - - 75
See Infant.

RIGHT TO RESCIND - - - - 214
See Company. 1.

RULES OF SUPREME COURT, Order III., r. 6
See Practice. 16. [536

—— **Order V., r. 7** - - - - 415
See Perjury.

—— **Order XIV., r. 1** - - - 536
See Practice. 16.

—— **Order XVI., r. 1** - - - 496
See Practice. 9.

—— **Order XIX., r. 4** - - - 630
See Practice. 14.

—— **Order XXII., r. 8** - - - 498
See Practice. 13.

—— **Order XXVII., r. 1** - - - 615
See Practice. 14.

—— **Order XXXI., r. 1** - - - 524
See Practice. 8.

—— **Order XXXIV., r. 2** - - - 67
See Practice. 12.

—— **Order XXXVI., rr. 16, 22** - 177, 605
See Practice. 6, 10.

RULES OF SUPREME COURT—*continued.*

—— Order XXXIX., r. 1 - - - 605
See Practice. 10.

—— Order XL., rr. 1, 5, 6 - - 124, 177
See Practice. 6, 15.

—— Order XLI., r. 1 - - - - 415
See Perjury.

—— Order LV. - - - 171, 335
See Practice. 4, 5.

—— Order LVII., r. 6 - - 171, 605
See Practice. 4, 10.

—— Order LVIII., r. 8 - - - 117
See Practice. 1.

—— Order LXII. - - - - 43
See Practice. 2.

SALE OF GOODS—*Mercantile Contract—Time of Shipment—Dates of Bills of Lading.*] Defendants, by contracts, dated London, 17th March, bought of plaintiffs "about 600 tons of Madras rice, to be shipped at Madras or coast for this port during the months of March $\frac{\text{and}}{\text{or}}$ April, per *Rajah of Cochin*." The 600 tons filled 8200 bags, of which 7120 were shipped between the 23rd and 28th of February, in three parcels, and the last bill of lading was signed on the latter day; of the other 1080 bags, 1030 were put on board on the 28th of February, and the remaining 50 on the 3rd of March, and the bill of lading signed on that day. Defendants having refused to accept the rice:—*Held*, reversing the judgment of the Queen's Bench Division, that under the circumstances the rice was shipped according to the contracts, for that the fact of there being several bills of lading instead of the whole being shipped under one bill made no difference; and that the defendants were bound to accept the rice.—*Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 530) followed. Shand *v.* Bowes - **C. A. 112**

2. —— *Chattel sold for specific Purpose—Warranty by Vendor of Fitness for Purpose—No Exception as to latent Defect—Measure of Damages.*] On the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects.—The limitation as to latent defects introduced by *Readhead* v. *Midland Ry. Co.* (Law Rep. 4 Q. B. 379) does not apply to the sale of a chattel.—The plaintiff ordered and bought of the defendant, a coach builder, a pole for the plaintiff's carriage. The pole broke in use and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence:—*Held*, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole. Randall *v.* Newson **C. A. 102**

3. —— *Contract obtained by Fraud—Passing of Property—Conviction of Buyer for obtaining Goods under False Pretences—Restitution of Property*—24 & 25 *Vict. c.* 96, *s.* 100.] A. Blenkarn took premises at 37, Wood Street, and wrote to the plaintiffs at Belfast ordering goods of them. The

SALE OF GOODS—*continued.*

letters were dated 37, Wood Street, and signed "A Blenkarn & Co." in such a way as to look like "A. Blenkiron & Co.," there being an old-established firm of Blenkiron & Sons at 123, Wood Street. One of the plaintiffs knew something of that firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing them to "A. Blenkiron & Co., 37, Wood Street." The fraud having been discovered, Blenkarn was indicted and convicted for obtaining goods by falsely pretending that he was Blenkiron & Sons. Before the conviction the defendants had purchased some of the goods bonâ fide of Blenkarn without notice of the fraud, and re-sold them to other persons. The plaintiffs having brought an action for the conversion of the goods:—*Held*, reversing the decision of the Queen's Bench Division, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn; that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action. *Hardman* v. *Booth* (1 H. & C. 803; 32 L. J. (Ex) 105) followed. Lindsay *v.* Cundy - - - **C. A. 96**

—— False pretences - - - 301, 510
See False Pretences. 1, 2.

SALVAGE EXPENSES, - - - 501
See Marine Insurance.

SCRIP - - - - - - 194
See Negotiable Instrument.

SEA-WALL—*Liability of Frontagers to repair—Prescription.*] The plaintiff was the occupier of land and the defendant the owner of adjoining land, both fronting to a creek communicating with the sea. It was necessary for the protection of his land that each person having land fronting the creek should maintain a sea-wall to keep out the high tides, and such sea-wall had been maintained along the creek time out of mind. The plaintiff's wall was continuous with the defendant's, and the level of the defendant's land was higher than that of the plaintiff's. It became necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height; the defendant had neglected so to top his wall, and owing to an extraordinary high tide, the water flowed over his wall, and so from the defendant's land on to the plaintiff's land, doing considerable damage:—*Held*, affirming the judgment of the Queen's Bench Division, first, that the mere fact that each frontager had always maintained the wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbour's land, was no sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall for the protection of the adjoining landowners:—Secondly, that by the common law, apart from prescription, no such liability was cast on the defendant, as a frontager. Hudson *v.* Tabor - - - - - **C. A. 290**

SESSIONS—*Appeal to—Reference to Arbitrator—Costs—Taxation, out of Sessions*—12 & 13 *Vict. c.* 45, *s.* 13.] An appeal to the quarter sessions against a rule was referred by consent under

SESSIONS—*continued.*

12 & 13 Vict. c. 45, s. 13. By the order of reference the costs of the appeal and reference were to be in the discretion of the arbitrator.—The arbitrator determined the matter of the appeal in favour of the respondents, and awarded them the costs of the appeal and reference. The award was thereupon entered as the judgment of the sessions under 12 & 13 Vict. c. 45, s. 13, and the costs having been taxed after the sessions, an order of sessions was subsequently drawn up confirming the rate, and ordering the appellants to pay the costs so ascertained by taxation. The appellants objecting that the order was made without jurisdiction, because the costs had not been taxed in sessions:—*Held*, that it was implied in the terms of the reference that the costs should be taxed out of sessions, and that the order was therefore valid.—*Reg.* v. *Long* (1 Q. B. 740) distinguished. The Southampton Gaslight and Coke Company *v.* Southampton Union 371

SETTING DOWN MOTION - - - 117
See Practice. 1.

SETTLEMENT BY RESIDENCE - - 286
See Poor Law. 3.

SEWERING, PAVING, &c. - - - 379
See Local Government Acts.

SHARES IN BANKING COMPANY - 194
See Negotiable Instrument.

SKATING RINK - - - - 417
See Music.

SHIP—*Bill of Lading, Transfer of—Rights as between Transferee and Unpaid Vendor—Valuable Consideration—Stoppage in Transitu.*] The transfer of a bill of lading for valuable consideration to a bonâ fide transferee defeats the right of stoppage in transitu of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder.—In December, 1875, G. & Co. purchased from defendant a shipment of nuts, to be paid for by acceptance at three months on receipt of shipping documents. On the 1st of January, 1876, G. & Co., being already indebted to plaintiff, applied to him for a further advance, which he said he would give, but they must first cover their account. G. & Co. promised to give him cover (not naming any particular securities), and plaintiff at once advanced them a further sum of 2000*l.* On the 4th of January the bill of lading of the nuts, indorsed in blank, came into the possession of G. & Co. from defendant, and they accepted defendant's draft; and on the following day they handed the bill of lading to plaintiff with other securities, in fulfilment of their promise to give him cover. This transaction between plaintiff and G. & Co. was bonâ fide. On the arrival of the ship on the 3rd of February, G. & Co. having in the meantime stopped payment, defendant sought to stop the nuts in transitu, and plaintiff claimed them under the bill of lading:—*Held*, that the plaintiff had a good title as against the defendant.—*Rodger* v. *Comptoir d'Escompte de Paris* (Law Rep. 2 P. C. 393) dissented from. Leask *v.* Scott Brothers - - C. A. 376

2. —— *Carriage of Merchandise—Warranty of Seaworthiness—Ship seaworthy whilst lying in Port of Loading, but becoming unseaworthy at Time of sailing on Voyage with Cargo on board.*] The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo, attaches at the time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy whilst lying in the port of loading, and also at the times of starting from her anchorage for and arriving at the place of loading appointed by the charterer, and of commencing to take on board her cargo.—The defendants were the owners of a vessel, and chartered her for a voyage to D., from the port of S., where she was then lying in a seaworthy condition. Pursuant to the terms of the charterparty, and by the orders of the plaintiff, the vessel proceeded to a wharf situate in the port of S., and there loaded on board a cargo of cement belonging to the plaintiff. At the time when she commenced taking in the cargo she was seaworthy; but by the time of setting sail on her voyage she had from some unknown cause become unseaworthy. The defendants were not guilty of negligence in sending her to sea in the condition in which she then was. Soon after starting from S. she began to leak; but the wind being fair for the voyage to D., the master resolved to keep his course for D., and he was not guilty of any negligence in not returning to S. The vessel did not reach D. but foundered at sea, and the plaintiff's cargo of cement was totally lost:—*Held*, that the warranty of seaworthiness implied by law upon entering into the charterparty had been broken, and that the plaintiff was entitled to recover the value of the cargo shipped by him on board the vessel. Cohn *v.* Davidson - - - - 455

3. —— *Charterparty—Rejection—Time—Detention.*] The plaintiff agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when the plaintiff was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:—*Held*, affirming the decision of the Queen's Bench Division, that the plaintiff was entitled to throw up the charterparty. Tully *v.* Howling C. A. 182

4. —— *Charterparty, Construction of—Cesser of Charterer's Liability—Waiver of Lien on Cargo at Request of Charterer's Agent—Charterer Consignee of Cargo—Demurrage—Damages for Detention—Stiffening Coal.*] Statement of claim, that defendants chartered plaintiff's ship for a voyage from Cardiff to Callao with a cargo of coals, to be consigned to defendants' agent at Callao. By the charterparty the ship was to be loaded at the rate of 75 tons per day, commencing when she was wholly unballasted; stiffening coal to be supplied at the ship's expense at the rate of 40 tons per working day, all days on which stiffening coal was taken on board or the ship was detained for the same, to be excluded from the working days allowed for loading; the vessel to be discharged at the rate of 40 tons per day; demurrage to be paid for each day beyond the

SHIP—*continued.*

said days allowed for loading and discharging at the rate of 3*d.* per registered ton per day; the master to have a lien on the cargo for all freight and demurrage; all liability of the charterers to cease as soon as the cargo was on board; and all questions, whether of short delivery, demurrage, or otherwise, to be settled with charterer's agent at the port of destination (which settlement to be binding on the owners); the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage.—That the ship was detained by the default of the defendants in providing stiffening coal; that the cargo was ultimately loaded; that plaintiff requested the defendants' agent at Callao to settle the claims as to demurrage, &c., of the plaintiff, which he refused to do; but the defendants' agent required the plaintiff to deliver the cargo, which the plaintiff accordingly did, without enforcing his lien for demurrage. Plaintiff claimed 350*l.* from the defendants for demurrage or damages for detention. —The defendants demurred to so much of the claim as alleged liability under the charterparty, on the ground that the liability of the defendants had ceased on the loading of the cargo:—*Held*, 1. That the demurrage clause applied to the loading of the stiffening coal as well as to the loading of cargo proper. But, 2. Even if it did not, the lien for "demurrage" would extend to damages for detention by not loading stiffening coal, as well as to demurrage proper. And therefore, 3. That the cesser of liability clause applied to liability in respect of both. 4. That the fact that defendants were themselves consignees as well as charterers made no difference in the construction of the cesser of liability clause. 5. That the rest of the clause, giving the defendants' agent power to settle claims for short delivery and demurrage, made no difference in the construction as to cesser of liability. 6. That the facts, that the defendants' agent refused to settle the demurrage, and that the plaintiff had delivered the cargo at the request of the defendants' agent without enforcing the lien, did not revive the defendants' liability under, or give rise to an action on, the charterparty. Sanguinetti *v.* The Pacific Steam Navigation Company C. A. 238

5. —— *Charterparty — Freight—Voyage not completed—Freight pro ratâ.*] A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th of December, at Kertch, which was as near as he could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; and they on the 27th of December delivered it to the agent of the railway company on his producing written authority from the company, together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the charterparty and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight:—*Held*, affirming the judgment of the Queen's Bench Division, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty; secondly, that the plaintiff was not entitled to freight pro ratâ, as no new contract for such freight had been made. Metcalfe v. The Britannia Ironworks Company - - - - C. A. 423

6. —— *General Average — Imminent Risk — Auxiliary Steam Pumping Power — Spars and Cargo burnt as Fuel.*] A ship sailed well equipped and manned for the voyage, having a donkey-engine on board and a reasonable supply of coals to work it for pumping purposes. The ship met with very heavy weather and sprang a leak, and in order to keep her afloat it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo:—*Held*, that the sacrifice of the spars and cargo was general average. Robinson *v.* Price 91; C. A. 295

SPARS—Burnt as fuel - - - 295
See Ship. 6.

SPECIAL CASE - - - - 314
See Frauds, Statute of.

STANNARIES ACT - - - - 26
See Company. 2.

STATE, ACT OF - - - - 210
See Jurisdiction.

STIFFENING COAL - - - - 238
See Ship. 4.

STOPPAGE IN TRANSITU - - - 376
See Ship. 1.

STATUTES:

25 Geo. 2, c. 36, s. 2 - - - 417
See Music.

5 Geo. 4, c. 83, s. 4 - - - 516
See Mandamus.

—— —— - - - - 131
See Vagrancy Act.

2 & 3 Wm. 4, c. 64 - - - 544
See Municipal Corporations Act.

3 & 4 Wm. 4, c. 27, ss. 2, 3 - - 485
See Limitations, Statute of.

5 & 6 Wm. 4, c. 76, s. 117 - - - 544
See Municipal Corporations Act.

6 & 7 Vict. c. 86, s. 28 - - - 271
See Res Judicata.

6 & 7 Vict. c. 96, s. 8 - - - 37
See Practice. 3.

8 Vict. c. 18, s. 68 - - - - 224
See Ferry.

—— —— ss. 68, 121 - - - 151
See Lands Clauses Act. 1.

STATUTES—*continued.*

8 Vict. c. 18, s. 127 - - - - 33
See Lands Clauses Act. 2.

8 Vict. c. 20, s. 68 - - - - 224
See Ferry.

—— —— s. 90 - - - - 254
See Railway Company. 1.

—— —— s. 145 - - - - 406
See Railway Company. 2.

9 & 10 Vict. c. 66, s. 1 - - - 522
See Poor Law. 2.

10 & 11 Vict. c. 14, s. 13 - - - 127
See Markets Act.

11 & 12 Vict. c. 43, s. 11 - - - 389
See Local Government Acts.

11 & 12 Vict. c. 63, s. 27 - - - 30
See Local Government Acts.

12 & 13 Vict. c. 45, s. 13 - - - 371
See Sessions.

12 & 13 Vict. c. 92, s. 5 - - - 118
See Pound.

13 & 14 Vict. c. 57, s. 7 - - 366
See Vestry Clerk.

13 & 14 Vict. c. 61, ss. 1, 14 - - 125
See County Court.

15 & 16 Vict. c. 83, s. 41 - - - 493
See Patent.

16 & 17 Vict. c. 97, s. 96 - - - 15
See Lunatic.

17 & 18 Vict. c. 31, s. 2 - - - 254
See Railway Company. 1.

17 & 18 Vict. c. 36 - - - - 361
See Bills of Sale Act.

17 & 18 Vict. c. 125, s. 3 - - - 626
See Arbitration.

—— —— ss. 5, 32 - - - 314
See Frauds, Statute of.

—— —— ss. 3–6 - - - - 335
See Practice. 5.

18 & 19 Vict. c. 120 - - - 145
See Metropolis Management Acts.

19 & 20 Vict. c. 108, s. 26 - - - 177
See Practice. 6.

20 & 21 Vict. c. 43 - - - 129
See Cases stated by Justices.

21 & 22 Vict. c. 98, ss. 62, 63 - - 389
See Local Government Acts.

24 & 25 Vict. c. 96, s. 75 - - - 157
See Agent.

—— —— s. 100 - - - - 96
See Sale of Goods. 3.

25 & 26 Vict. c. 61, s. 32 - - - 349
See Highway.

25 & 26 Vict. c. 89, s. 35 - - - 463
See Company. 3.

—— —— s. 67 - - - - 314
See Frauds, Statute of.

27 & 28 Vict. c 39, s. 7 - - - 366
See Vestry Clerk.

29 & 30 Vict. c. 96, s. 4 - - - 361
See Bills of Sale Act.

30 & 31 Vict. c. 142, s. 5 - - - 626
See Arbitration.

STATUTES—*continued.*

30 & 31 Vict. c. 142, s. 13 - - - 152
See County Court.

32 & 33 Vict. c. 19, s. 4 - - - 26
See Company. 2.

32 & 33 Vict. c. 67 - - - - 199
See Valuation (Metropolis) Act.

32 & 33 Vict. c. 70, s. 57 - - - 331
See False Representation.

33 & 34 Vict. c. 75, s. 75 - - - 141
See Elementary Education Act.

34 Vict. c. 26 - - - - 590
See Universities Tests Act.

35 & 36 Vict. c. 65, s. 4 - - - 209
See Bastardy.

35 & 36 Vict. c. 94, s. 12 - - - 403
See Public-House. 1.

36 & 37 Vict. c. 66, s. 39 - - - 171
See Practice. 4.

—— —— ss. 19, 47 - - 37, 43
See Practice. 2, 3.

37 & 38 Vict. c. 49, ss. 8, 9 - - - 383
See Public-House. 2.

37 & 38 Vict. c. 54, ss. 3, 8, 10 - - 285
See Poor Rate. 1.

37 & 38 Vict. c. 55 - - - - 590
See Universities Tests Act.

37 & 38 Vict. c. 85, s. 7 - - - 588
See Prohibition.

38 & 39 Vict. c. 50, s. 6 - - - 125
See County Court.

38 & 39 Vict. c. 55, s. 253 - - 608
See Local Government Acts. 2.

38 & 39 Vict. c. 63, s. 6 - - - 530
See Adulteration.

38 & 39 Vict. c. 77, s. 19 - - 37, 43
See Practice. 2, 3.

39 & 40 Vict. c. 59, s. 17 - - - 605
See Practice. 10.

39 & 40 Vict. c. 61, s. 34 - - - 269
See Poor Law. 2.

39 & 40 Vict. c. 69, s. 11 - - - 397
See Elementary Education Act.

SUING AND LABOURING CLAUSE - 501
See Marine Insurance.

SUPERFLUOUS LANDS - - - 339
See Lands Clauses Act. 2.

SURRENDER OF TERM—Operation of law 755
See Practice. 11.

TAXATION OUT OF SESSIONS - - 371
See Sessions.

TENANT FOR RESIDUE OF A TERM HAVING LESS THAN ONE YEAR TO RUN 151
See Lands Clauses Act. 1.

TIME—Fixed by statute for doing act - 199
See Valuation (Metropolis) Act.

—— Of shipment - - - - 112
See Sale of Goods. 1.

—— Within which summary proceedings may be taken - - - - 379
See Local Government Acts.

TRAVELLER - - - - - 136
See Innkeeper.

TREATY WITH A FOREIGN SOVEREIGN 69
See Petition of Right.

TRIAL BEFORE OFFICIAL REFEREE - 124
See Practice.

TWO INVENTIONS - - - - 493
See Patent.

UNDUE PREFERENCE - - - 254
See Railway Company. 1.

UNION ASSESSMENT COMMITTEE ACT, 1864
See Vestry Clerk. [366

UNIVERSITIES TESTS ACT, 1871—(34 *Vict. c.* 26)—*New Endowment with Religious Test—Hertford College Act*, 1874 (37 & 38 *Vict. c.* 55). By the Hertford College Act, 1874, Magdalen Hall, in the University of Oxford, was dissolved, Hertford College created, and the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship, restricted to members of specified churches, was afterwards accepted by Hertford College. A candidate having been refused examination for the fellowship, on the ground that he was not a member of any of the specified churches:—*Held*, that a mandamus must issue commanding the college to examine the candidate, and to proceed to an election, for by the Universities Tests Act, 1871, Magdalen Hall, as a "college" subsisting at the passing of the Act, could not have accepted an endowment subject to such a restriction, and under the Hertford College Act, 1874, Hertford College stood in the same relation to the Universities Tests Acts, 1871, as Magdalen Hall:—*Held*, also, that the fact that another candidate had been elected, and the office was full, did not affect the right to proceed by mandamus. The Queen *v.* Hertford College - - - - - 590

USE AND OCCUPATION—*Vendor and Vendee—Verdor remaining in Possession after Time fixed for Completion—Vendee entitled to "all Rents and Profits."* Claim for use and occupation, stating that the plaintiffs and defendants entered into an agreement for the purchase by the plaintiffs of warehouses and premises belonging to the defendants. That by the agreement the purchase was to be completed and possession given to the plaintiffs on the 29th of September, 1869, up to which time all outgoings were to be paid by the defendants, and from which time the plaintiffs were to receive all rents and profits, the plaintiffs to pay interest on the purchase-money from the 29th of September until the completion of the purchase. That in fact the purchase was not completed till the 13th of March, 1876, though the plaintiffs were ready and anxious to have completed it at an earlier date. That the plaintiffs paid the purchase-money by instalments on various dates prior to the 13th of March, 1876, and interest on the same according to the agreement. That the defendants refused to give up possession on the completion of the purchase, &c., but the plaintiffs obtained possession by warrant from the sheriff on the 3rd of April, 1876:—*Held*, that under the words "all rents and profits" in the agreement, the plaintiffs were entitled to a

USE AND OCCUPATION—*continued.*
fair occupation rent, and that it was immaterial whether or not the occupation would by itself have been sufficient to support the action. The Metropolitan Railway Company *v.* Defries [189; C. A. 387

VAGRANCY ACT (5 *Geo.* 4, *c.* 83), *s.* 4—*Married Woman leaving Children chargeable to Parish—"Person."*] A married woman, who, deserted by her husband, and having no means of maintaining her children, leaves them, so that they become chargeable to the parish, cannot be convicted for running away and leaving them chargeable, under the Vagrancy Act, 5 Geo. 4, c. 83, s. 4. Peters *v.* Cowie - - - - 131

VALUABLE CONSIDERATION - - 376
See Ship. 1.

VALUATION LIST - - - - 366
See Vestry Clerk.

VALUATION (METROPOLIS) ACT, 1869 (32 & 33 *Vict. c.* 67), *ss.* 5, 6, 7, 14, 18, 23, 42—*Preparation of Valuation List—Construction of Statute—Directory and not Imperative—Time fixed by Statute for doing Act.*] By the Valuation (Metropolis) Act, 1869, s. 5, provision is made for the appointment, within the metropolis, of assessment committees; by s. 6 a valuation list of rateable property is to be made by the overseers of every parish; by s. 7 (which incorporates certain sections of the Union Assessment Committee Act, 1862), the valuation list is to be deposited and afterwards transmitted to the assessment committee, who, after hearing objections and making such alterations as may seem sufficient, are, by s. 14, to approve the same; by s. 18 special sessions, and by s. 23 assessment sessions, are constituted for hearing appeals against valuation lists; by s. 42 "the overseers shall make and deposit the valuation list before the 1st of June," and "shall transmit the valuation list to the assessment committee not sooner than fourteen, and not later than seventeen, days after notice is given of the deposit of such list; the assessment committee shall finally approve .... the valuation list .... before the 1st of November;" and special sessions may be held at any time after the 30th of November and before the 1st of January.—The appellants were the occupiers of rateable property situate in a parish within the limits of the Valuation (Metropolis) Act, 1869. Upon the 27th of September, the overseers made and deposited a valuation list, in which the appellants' property was assessed at certain amounts. The list was transmitted to the assessment committee on the 18th of October. On the 7th of December the assessment committee met, when the appellants objected to the amounts at which their property was assessed, and these were reduced by the committee; after the meeting of the assessment committee no special sessions were held to which the appellants could have appealed, but they appealed to the assessment sessions, who confirmed the list:—*Held*, that delay in making, depositing, transmitting, and approving the valuation list within the times prescribed by s. 22 of the Metropolis (Valuation) Act, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative. The Queen *v.* Ingall - 199

VENDEE—Entitled to "all rent and profits" 189
See Use and Occupation.

—— Guaranteeing dividend - - 214
See Company. 1.

VESTED OR CONTINGENT ESTATE - 18
See Devise.

VESTRY CLERK—*Special Payment to—Valuation List—Extraordinary Duties—Disallowance by Poor Law Auditor—Union Assessment Committee Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 7; *Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 6, 7—*Vestry Clerks Act* (13 & 14 *Vict. c.* 57), *s.* 7.] A special payment made by the vestry of a metropolitan parish to the vestry clerk, and ordered to be charged upon the poor rate, for preparing the valuation list required by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), was disallowed by the poor law auditor, on the ground that the preparation of the list was among the statutory duties of the vestry clerk, for which he was remunerated by salary, and because the charge was excessive, there being nothing to shew the payment ro any person of any part of that sum:—*Held*, that the disallowance must be quashed, for there was nothing in the Vestry Clerks Act (13 & 14 Vict. c. 57) to shew that the preparation of the valuation list was among the general duties of the vestry clerk, and that, with regard to the alleged excess in the charge, the claim of the vestry clerk was not limited to his expenses, and it did not appear that the amount paid was not la reasonable allowance for his work and outlay. The Queen *v.* Cumberlege [366

VOTES, COUNTING OF - - - 30
See Local Government Acts. 1.

WARRANTY—Fitness for purpose - - 102
See Sale of Goods. 2.

WARRANTY OF SEAWORTHINESS - 455
See Ship. 2.

WAIVER—Lien on cargo at request of charterer's agent - - - - 238
See Ship. 4.

WORDS—"Faults taken with all" - 331
See False Representation.

—— "Found drunk on licensed premises" 403
See Public-House. 1.

—— Freight and other conditions as per charter-party - - - - 423
See Ship. 5.

—— "Liable to contribute in whole or in part to county rate" - - - 544
See Municipal Corporations Act.

—— "Parish separately maintaining its own highways" - - - - 349
See Highway.

—— "Party aggrieved" - - - 608
See Local Government Acts. 2.

—— "Person" - - - - 131
See Vagrancy Act.

—— Rents "all rents and profits" - 189
See Use and Occupation.

—— "Specific contract" - - - 286
See Poor Rate. 1.

END OF VOL. II.

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